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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 207.

EXSTEIN NORTON, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE TOWN OF DYERSBURG, TENNESSEE

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED FEBRUARY 23, 1885.

payment of the past-due ordinary liabilities of the municipality; the bonds here are issued in payment of a stock subscription authorized by the same vote which authorized the issuing of bonds. Again, repeating the language of this court in the case of Marsh *vs.* Fulton County, 10 Wallace, 676, "any purchaser of these bonds in looking at this act would see at once that they were not such bonds as were contemplated by the statute."

Tax-payers of Milan *vs.* Railroad, 11 Lea.

SPARREL HILL,
Attorney for Defendants in Error.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 3, 1887.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said circuit court before you, between Exstein Norton, *is* plaintiff, and Mayor & Aldermen of the Town of Dyersburg, *are* defendants, manifest error hath happened, to the great damage of the said Exstein Norton, as by complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1885, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 9th day of January, A. D. 1885, and 10– of American Independence.

BELL W. ETHERIDGE, *Clerk.*
—— ——, *D. C.*

[Endorsed:] No. 35. Circuit court of the United States, western district of Tennessee. Extein Norton *vs.* Mayor and Aldermen of Dyersburg, Tenn. Writ of error. Issued the 9 day of Jan'y, A. D. 1885. Bell W. Etheridge, clerk. —— ——, D. C.

2 Supreme Court of the United States.

Know all men by these presents that we, Exstein Norton, & D. H. Poston & W. H. Poston, as sureties, are held and firmly bound unto the mayor & alderman of the town of Dyersburg, Tennessee, in the sum of five hundred ($500.00) dollars, to be paid to the said mayor & alderman of the town of Dyersburg, its executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 9th day of January, 1885.

Whereas the above-named Exstein Norton hath prosecuted a writ of error appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Exstein Norton shall prosecute his said writ of

error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EXSTEIN NORTON, [SEAL.]
Per POSTON & POSTON, *His Att'y-*. [SEAL.]
D. H. POSTON. [SEAL.]
W. K. POSTON. [SEAL.]

Acknowledged before me this 9 day of Jan'y, 1885.
BELL W. ETHERIDGE, *Clerk.*
——— ———, *D. C.*

Approved:
E. S. HAMMOND, *Judge, &c.*

[Endorsed:] No. 35. Circuit court of the United States, western district of Tennessee. Extein Norton *vs.* The Mayor & Alderman of Dyersburg, Tenn. Writ of error bond to United States Supreme Court. Filed the 9 day of Jan'y, A. D. 1885. Bell W. Etheridge, clerk. ——— ———, D. C.

3 United States of America to mayor & alderman of the town of Dyersburg, Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1885, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein Exstein Norton is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 9th day of January, 1885.

E. S. HAMMOND, *Judge.*

Service of within acknowledged Jan'y 9, '85.
T. B. TULLY &
SPL. HILL,
Per T. B. TURLEY,
Atty's for Dyersburg.

[Endorsed:] No. 35. Circuit court of the United States, western district of Tennessee. Extein Norton *vs.* The Mayor & Alderman of Dyersburg, Tenn. Citation. Filed the — day of ———, A. D. 187–. ——— ———, clerk. ——— ———, D. C.

4 *Bill of Exceptions.*

EXTEIN NORTON
vs.
THE MAYOR AND ALDERMEN OF DYERSBURG.

The above-named cause was tried in the circuit court of the United States for the eastern division of the western district of Tennessee, at the October term, 1884, of said court, when the following proceedings were had, to wit:

The parties filed written stipulations agreeing that the cause should be tried before the Hon. E. S. Hammond, district judge, presiding, without the intervention of a jury, under and pursuant to sections 649 and 700 of the United States Revised Statutes, the said
5 stipulation being in the words and figures as follows, viz:

Stipulation.

In the Circuit Court of the United States for Western District of Tennessee, at Jackson, Tenn.

EXTEIN NORTON
vs.
THE MAYOR & ALDERMEN OF DYERSBURG, TENN.

Stipulation as to facts and agreement of counsel.

1st. It is agreed that the plaintiff is the owner and holder of the bonds and coupons sued on in the declaration herein; that he is now and was at the date of the bringing of this suit a resident citizen of the State of New York; that he bought said bonds and coupons before maturity, for full value, and without any knowledge or
6 notice of any defect, infirmity, equity, or condition against the liability of said town therefor, unless as matter of law the face of said bonds charges him with notice.

2nd. It is agreed that the bonds and coupons sued on were as a matter of fact signed, sealed, and delivered by the properly authorized municipal officers of the defendant, but the want of authority so to do is controverted, the defendant insisting that no proper legislation or other authority existed for the making of the subscription and issuance of the bonds that were made and issued, the plea of *non est factum* only going to that extent.

3rd. It is agreed that the defendant is a municipal corpo-
7 ration and was at the date of the subscription and issuance of the bonds herein sued upon, with full power to sue and be sued, having its *situs* within the jurisdiction of this honorable court.

4th. That the Mississippi River railroad, to whom it is claimed the subscription was originally authorized to be made by the defendant, was afterwards consolidated with and became a part of the Paducah and Memphis R. R. Co., and that the company mortgaged its properties and franchise of every character and nature, which mortgage was foreclosed and the purchaser under such foreclosure sale reorganized under the statute law of the State of Tennessee as

the Chesapeake, Ohio and Southwestern R. R. Co., by whom the road was built and finally completed on January 1st, 1882,
8 and is now operated as a railroad its entire length.

5th. That the bed and track is now and was at the date of the bringing of this suit fully built and equipped and operated through the county of Dyer, and the Chesapeake, Ohio and Southwestern Railroad Company had built a depot building within half a mile of the court-house in the town of Dyersburg before this action was brought.

6th. It is agreed that the paper, Exhibit "B," contains so much of the proceedings of the board of mayor and aldermen of the defendant corporation relative to the subscription in controversy as is necessary for the purpose of this suit, and same may be used without any further authentication, being signed by Spiral Hill,
9 T. B. Turley, and D. H. Poston.

7th. It is agreed that the statutes, charters, and other alleged legislative authority for the subscription and all laws and statutes or any subjects herein involved found in the statutes of Tennessee may be used by either party without further proofs or authentication.

8th. It is agreed that the question of this subscription was left under proper notices to the decision of the qualified voters of the corporation of the town of Dyersburg, the defendant, and that said subscription was carried by almost a unanimous vote of said town, the vote being largely in excess of the requisite constitutional majority.

9th. It is agreed that at the date of said subscription the
10 town of Dyersburg was without railroad facilities, and that the object of such subscription was to aid the building of the proposed line near the town of Dyersburg, and that the railroad has been built, but no part of the subscription has been paid except the first installment of interest, which was paid.

Memphis, Tenn., October 3rd, 1884.

HARRIS & TURLEY AND
SPL. HILL,
For Mayor & Aldermen of Dyersburg.
SMITH & COLLIER,
PARKS & DRAPER, AND
POSTON & POSTON,
For Plaintiff.

EXHIBIT "B" TO STIPULATION.

MEMPHIS, TENN., *July* 13, '72.

At a meeting of the board of directors of the Paducah
11 and Memphis Railroad Company held this day—present, L. S. Trimble, vice-president; Jno. Overton, Jr., W. F. Norton, D. M. Henning, and A. T. Lacy; L. S. Trimble, vice-president, in the chair.

The minutes of the meeting of May 1st were read and approved.

Jno. Overton, Jr., offered a resolution as follows:

Whereas C. P. Clark, mayor of the town of Dyersburg, in the

county of Dyer, in the State of Tennessee, by his subscription in writing, has subscribed in behalf of the town of Dyersburg the sum of fifty thousand dollars to the capital stock of the Paducah and Memphis Railroad Company, which said subscription is in the words and figures following, to wit:

MAYOR'S OFFICE, DYERSBURG, *July 8th*, 1872.

12 DEAR SIR: I beg leave to submit herewith a copy of the proceedings of the board of mayor and aldermen of the town of Dyersburg, authorizing me to subscribe $50,000.00 (fifty thousand dollars) to the capital stock of the Paducah and Memphis Railroad Company on certain terms and conditions minutely set forth in said proceedings, payable in bonds of the town of Dyersburg, bearing seven per cent. interest, payable semi-annually.

In pursuance of the authority thus conferred upon me I herewith tender and propose to subscribe said sum to the capital stock of your company on the terms proposed, and will promptly issue the bonds of said town, if accepted, as soon as the terms and stipulations allow it.

I have the honor to be, sir, very respectfully, &c.,

C. P. CLARK,
Mayor of Dyersburg.

13 To the president of the Paducah and Memphis Railroad Company.

Now, therefore, be it resolved, That this board does hereby, in behalf of the Paducah and Memphis Railroad Company, accept said subscription made by said town of Dyersburg, through said C. P. Clark, upon the terms therein expressed.

Resolved 2nd, That the record of the proceedings of the board of mayor and aldermen of said town of Dyersburg accompanying said subscription be entered upon the minutes of this meeting, and the same is accordingly done, as follows:

STATE OF TENNESSEE, *Town of Dyersburg:*

Be it remembered that at a meeting of the board of mayor and aldermen of the town of Dyersburg, held at the court-house
14 (within said town), on the 5th day of June—present, his honor, Mayor Clark, and every one of the aldermen of said town—in the year 1872, the following ordinance was adopted by unanimous vote of said board, to wit: The president of the Paducah and Memphis Railroad Campany, by attorney, *this* (has) presented a memorial to the board of mayor and aldermen, praying the board to order an election to be held to allow the qualified voters of the corporation of Dyersburg to determine by ballot whether they are willing to authorize the mayor and alderman to make a subscription of $50,000.00 to the capital stock of said company, to be paid in the bonds of said corporation, said bonds to be due and payable in ten years from the date thereof, the interest there-

15 on to be paid semi-annually at the rate of seven per cent. per annum, for the purpose of assisting in preparing the road-bed of said railroad company through the county of Dyer.

And said memorial was accompanied by a statement of the cost of the work through Dyer county.

And whereas, heretofore, to wit, on the 9th day of August, 1871, upon application of the president of the Mississippi River Railway Company to the board, under and by virtue of which there was submitted to the qualified voters of said corporation, on the 12th day of September, 1871, the question as to their willingness to vote a subscription of $50,000.00 to the capital stock of said Mississippi River Railway Company; and whereas, in accordance with

16 said ordinance, said election was held on said 12th day of September, 1871, and resulted in favor of said subscription by a legal majority; and whereas said subscription so made was held to be illegal on account of its exceeding the amount allowed by the existing laws to be voted, and was never accepted by said railway company;

And whereas afterwards, to wit, on the 14th day of December, 1871, by the Legislature of the State of Tennessee (see chapter 122, sec. 1, acts of 1871) said action of the corporation of Dyersburg was ratified and said town authorized to revote a like amount of subscription;

And whereas, under and by virtue of provisions of their respective charters and under and by virtue of the laws of the States of Tennessee and Kentucky, the Paducah and Gulf Railroad Com-

17 pany and said Mississippi River Railway Company have been consolidated into one company, under the name and style of the Paducah and Memphis Railroad Company:

Therefore, on motion, the following ordinance was unanimously adopted, to wit:

SECTION 1. Be it ordained by the board of mayor and aldermen of the town of Dyersburg, State of Tennessee, that there shall be submitted to the qualified voters of the town of Dyersburg the proposition to subscribe fifty (50) thousand dollars in the bonds of said town to the capital stock of the Paducah and Memphis Railroad Company, on the following terms and conditions, viz: When the said railroad company has laid the track of said road to the northern and southern line of Dyer county and commenced work on

18 said railway within the limits of Dyer county, then the mayor shall issue to said railway company coupon bonds of the town of Dyersburg to the amount of said subscription, which is fifty thousand dollars; the whole of said bonds shall be known as the "Dyersburg Paducah and Memphis railroad bonds" and shall be due and payable in ten years from date of issuance, bearing interest at the rate of seven per cent. per annum, payable semi-annually; the bonds shall be issued in sums of $100.00, $250.00, and $500.00, with the necessary interest coupons attached.

SECTION 2nd. To pay the interest accruing upon said bonds and, if deemed advisable, to create a sinking fund for their redemption, it

shall be the duty of the board of mayor and aldermen of said
19 town, at their first regular meeting after the first day of December of each year, to levy a specific tax upon such subjects of taxation as they may deem best to meet the interest coupons falling due within the year succeeding said levy; and if the board of mayor and aldermen for any cause fail at the said meeting so to levy said tax, then the same may by said board be levied at any subsequent regular or called meeting, and the coupons of said bonds shall be receivable in the payment of said railroad tax.

SECTION 3. This subscription shall not become binding until ratified by a majority of three-fourths of the votes of the legally qualified voters of said town voting in an election held to test their sense on the question. The mayor shall make publication in both the Dyer County Progress and Neale's State Gazette, by proclamation, of an election to
20 be held for that purpose, with thirty days' notice, and shall also make publication of this ordinance in connection with said election notice. Those who favor said subscription at said election shall place on their ballot "For subscription" and those who oppose shall place on their ballots the words "No subscription."

SECTION 4. The above subscription is made on the condition that the Paducah and Memphis railway is to be located and built to Dyersburg and a depot of said road to be located within one-half mile of the court-house, without which condition accepted by said railroad company this subscription to be void, and no bonds shall be issued (and this condition shall be written or printed, if deemed necessary by the mayor, on the face of said bonds).

21 SECTION 5. The acceptance by the officers of said railroad company of any portion of the bonds herein authorized to be issued shall bind said company to the terms and conditions of said subscription as set forth in all the sections of this ordinance.

I certify that the foregoing is a full, true, and perfect copy of the proceedings of the mayor and aldermen in the matter of the subscription to the Paducah and Memphis Railroad Company as the same appears on the minutes of the board on the 5th day of June, 1872, now in my custody.

Dyersburg, July 8th, 1872.

F. G. SAMPSON, *Recorder.*

SATURDAY, *July 6th*, 1872.

The board of mayor and aldermen met at the court-house this evening at candle-light.

22 Present: Mayor Clark, Aldermen De Berry, McAllister, Miller, Painer, and Sampson.

The mayor reported to the board of aldermen that the people of the town of Dyersburg, by a vote of 126 votes "for subscription" to 2 votes for "no subscription," have authorized the mayor and aldermen to subscribe $50,000.00 to the capital stock of the Paducah and Memphis Railroad Company on the terms and conditions of the ordinance of June 5th, 1872.

In pursuance of the ordinance passed by this board on the 5th

day of June, 1872, which has been duly ratified by the legal majority of the qualified voters of the town of Dyersburg at the election today, on motion, it is ordered by unanimous consent that the mayor be authorized to subscribe $50,000.00 at once to the capital
23 stock of the Paducah and Memphis Railroad Company on the terms and conditions of said ordinance.

A true copy from the minutes.

Attest:

F. G. SAMPSON, *Recorder.*

Which said resolution, having been duly seconded, was, upon motion, adopted. It was ordered that the power of attorney from C. P. Clark, mayor of Dyersburg, to Isaac F. Child, of Dyersburg, Tennessee, be spread upon the records of the company. Said power of attorney is in words and figures as follows, to wit:

"Whereas I am fully authorized and empowered by the action of the board of mayor and aldermen of the town of Dyersburg, Dyer county, Tennessee, as well as by the vote of the people of the town ratifying that action, to subscribe fifty thousand dollars
24 in the bonds of the town of Dyersburg (payable in ten years from date of issuance and bearing seven per cent. interest, payable semi-annually from date of issuance) to the capital stock of the Paducah and Memphis Railroad Company; and whereas it is not convenient for me to go to Memphis now and attend to said business in person, I have, therefore, nominated and do hereby appoint and constitute Isaac F. Child, of Dyersburg, Tennessee, my true and lawful agent, proxy, and attorney-in-fact to do and perform whatever acts and things it may be proper and necessary for me to do to effect and perfect said subscription on the terms contained in my proclamation dated June 5th, 1872, hereby ratifying and confirming whatever my said attorney shall lawfully do in the premises, as if I did the same myself.

July 8th, 1872.

C. P. CLARK,
Mayor of Dyersburg, Tennessee.

25 STATE OF TENNESSEE, *Dyer County:*

Personally appeared before me, W. M. Watkins, clerk of the county court of said county, C. P. Clark, mayor of the town of Dyersburg, Tenn., who acknowledged the execution of the within instrument for the purposes therein contained. I further certify that I am personally acquainted with the said C. P. Clark.

Witness my hand and seal of the Dyer county court, affixed at Dyersburg, July 10th, 1872.

[SEAL.]

W. M. WATKINS, *Clerk,*
By ZACK. WATKINS, *D. C.*

On motion of D. M. Henning, a resolution in words and figures as follows was adopted:

Resolved, That the president of this company be authorized and instructed to call upon the town of Dyersburg for the bonds
26 subscribed to the capital stock of the Paducah and Memphis Railroad Company, amounting to $50,000.00, as soon as the conditions of said subscription upon the part of the county are complied with.

Jno. Overton, Jr., offered the following resolution, viz:

Whereas an obligation in the words and figures following has been executed and delivered to this company, to wit:

We, the undersigned citizens of the county Dyer and State of Tennessee, for and in consideration that the president and directors of the Paducah and Memphis Railroad Company have and do agree to build and locate their said road to and by the town of Dyersburg, Dyer county, Tenn., and to locate and build a depot thereon
27 within one-half mile of the court-house in said town, hereby guarantees a subscription to the capital stock of said company of one hundred thousand dollars in the following manner—that is to say:

We guarantee that there will be voted by the citizens of the corporation of Dyersburg the sum of fifty thousand dollars as a subscription to the capital stock of said company, and that said subscription will be paid in ten-year coupon bonds of said corporation, bearing interest at the rate of 7 per centum per annum, payable semi-annually, and that said bonds will be issued in accordance with the terms of a proclamation made by the mayor of said town dated June 5th, 1872, and published in the "Dyer County Progress" and "Neal's State Gazette," newspapers published in the town of
28 Dyersburg, and that said bonds will be prepared as soon as practicable after being voted, and will be delivered to said company in accordance with the terms of said proclamation.

We further agree that there will be subscribed to the capital stock of said Paducah and Memphis Railroad Company the sum of fifty thousand dollars of private individual subscription by good and solvent subscribers upon condition that said road is built and has a depot located within one-half mile of the court-house at Dyersburg, and payable as follows: Twenty-five per cent. of the amounts of said private subscription payable when the said road is constructed to the northern or southern line of said county and work thereon is commenced in Dyer county, the balance subject to calls of ten per cent. every thirty days.

29 This latter amount of fifty thousand dollars we guarantee will be subscribed and delivered to said company on or before the 10th day of July, 1872.

Witness our hands this June 20th, 1872.

T. E. RICHARDSON.
TOM W. NEAL.
JNO. S. KIFFINGTON.
H. L. FOWLKY.
F. G. SAMPSON.
C. I. COKER.
W. M. WATKINS.
W. E. DE BERRY.
P. E. WILSON.
B. C. BURGIS.
W. C. DOYLE.
WAT. SAMPSON.
S. R. LATTA.
I. F. CHILD.
A. M. STEVENS.
C. P. CLARK.
W. P. SUGG.
E. G. SUGG.
J. E. ROBERTS.
E. S. THURMOND.
R. R. WATSON.
JNO. L. WEBB.
ALF. STEVENS.
JNO. SAWYER.

Therefore, resolved, That this company accepts the said obligation and its stipulations as the consideration for building and
30 locating the road to and by the town of Dyersburg, and for building a depot thereon within half a mile of the court-house in Dyersburg; and, in reliance on said obligation, the board agrees to so build and locate the road and so to locate the depot.

2. That the $52,525 of private subscriptions this day tendered and received in pursuance of that portion of the above obligation which provides for the same is accepted upon the guaranty of its solvency by the above-named obligees.

Which said resolution, having been seconded, was, upon motion, adopted.

SPL. HILL.
D. H. POSTON.
TURLEY.

Exhibit "B" to stipulation.

31 Plaintiff then offered in evidence the bonds and coupons sued on, of dates, numbers, maturities, and amounts following, viz:

It was then agreed in open court by both parties that plaintiff had the coupon and bonds above named, and that all of said bonds were of like tenor and effect, save only as to numbers, dates, amounts, and maturities, and that all of said coupons were of like tenor and effect,

save only as to numbers, dates, amounts, and maturities, and that one of said bonds was in the words and figures following, viz:

"Bond No. —. $250.00.

The mayor and aldermen of the town of Dyersburg, in the State of Tennessee, a corporation duly chartered by act of the General Assembly of the State of Tennessee, by the qualified voters of
32 said town, under the provisions of an act of Legislature empowering them so to do, by this bond promise to pay to the bearer hereof, ten years after the date hereof, the sum of two hundred and fifty dollars, with interest at seven per centum per annum from this date, payable semi-annnually, at the city hall in Dyersburg, on presentation of the coupons hereto attached, to aid in the construction of the Paducah and Memphis railroad; upon the express condition, however, that the said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court-house in said town.

In testimony whereof the mayor and aldermen of the town of Dyersburg, Tennessee, have caused this bond and the coupons
33 attached to be signed by the mayor of said town and countersigned by the recorder on this 10th day of May, 1873.

[Seal Mayor and Aldermen, Dyersburg, Tenn.]

C. P. CLARK, *Mayor.*

Countersigned:

W. C. DOYLE, *Recorder.*"

And further agreed that one of the said coupons was in the words and figures following, viz:

$8.75. $8.75.

The mayor and aldermen of Dyersburg, Tenn., will pay the bearer on the — day of ——, 18—, eight dollars and seventy-five cents, being the semi-annual interest due on Paducah and Memphis railroad bond No. —.

C. P. CLARK, *Mayor.*
W. C. DOYLE, *Recorder.*

It was stipulated in open court by the attorneys of both
34 parties that the charter of the Mississippi River Railroad Company and all other acts of the Legislature of Tennessee claimed to authorize the subscription and issuance of said bonds by defendant might be considered and treated in evidence, although not formally offered, both in this court and in the Supreme Court of the United States, if this cause should be carried to that Court, without being copied into the record.

Plaintiff then rested.

Defendant offered no evidence.

This was all the evidence offered.

The court found as facts that—

1st. That an ordinance was regularly and legally adopted
35 June 5th, 1872, by the board of mayor and aldermen of the town of Dyersburg, ordering an election to be held by the

qualified voters of said town to determine whether the said town should subscribe for $50,000.00 of the capital stock of the Paducah and Memphis Railroad Company, to be paid for by said town by issuing to said railroad company its negotiable bonds to that amount, bearing interest at 7 per cent., and payable at 10 years from date; that on July 6th, 1872, said proposition was voted on by the qualified voters of said town, after 30 days' notice of such election had been duly published in the newspaper of said town, when said proposition was carried by a vote of 126 for the subscription to two against it; that at a meeting of the board of mayor and aldermen of said town, held on July 6th, 1872, the returns
36 of said election were duly and properly canvassed by said board, which, by ordinance then duly passed, declared the subscription on the terms of the ordinance of June 5th, 1872, was properly and legally carried in said election by the vote as before stated, and instructed the mayor to subscribe said sum of $50,000.00 to the stock of the said railroad company upon the terms and conditions of said ordinance; that, acting pursuant to that authority, the mayor of said town, on May 10th, 1873, subscribed for and in the name of said town said sum to the capital stock of said company, received certificate of stock therefor, issued and delivered the coupon bonds of said town for said amount to said railroad company, including those here in this suit; that when said coupon
37 bonds were so executed, issued, and delivered by said mayor to said railroad company the said company had laid the track of said road to the northern and southern line of Dyer county and commenced work on said railway within the limits of said county of Dyer; that plaintiff bought the bonds and coupons sued on herein in due course of trade for full value before maturity and without any knowledge or notice of any defect, infirmity, equity, or condition against the liability of said town, except so far as appears on the face of said bonds; that before the bringing of this suit the said railroad had been constructed and was being operated its entire length from Paducah, Kentucky, to Memphis, Tennessee, and was constructed to said town of Dyersburg, Tennessee, and had a
38 depot located within half a mile of the court-house in said town, the same having been done by the Chesapeake, Ohio and Southwestern R. R. Co. on or about the — day of ——, as set forth in the agreed statement of facts filed herein.

The court ruled that no legislative authority whatever existed for the issuance by said defendant of the bonds and coupons sued on in this case.

To which finding and ruling plaintiff then and there duly excepted.

The plaintiff requested the court to rule that under the facts found the defendant was authorized to execute, issue, and deliver to said railroad company the said bonds, which request was refused by the court, to which plaintiff then and there duly excepted.

39 The court thereupon rendered judgment in favor of defendant, supporting its judgment by reading the same opinion filed in the case of Green *vs.* Town of Dyersburg, 2 Flippin Reports.

477, and directing, by consent of counsel, that the said opinion be filed as its opinion in this case and sent up with the transcript of the record as required by the rules of the Supreme Court.

The plaintiff moved for a new trial, which motion was overruled by the court.

To all of which plaintiff presents this his bill of exceptions, which, being examined by the judge presiding and found to be correct, is signed, sealed, and made a part of the record in this cause this the 11th day of November, 1884.

E. S. HAMMOND, *Judge, &c.* [SEAL.]

40 We agree to the foregoing as a proper bill of exceptions.

SP'L HILL, *For Def'd'ts.*
SMITH & COLLIER,
For Plaintiff.
POSTON & POSTON,
For Plaintiff.
PARKS & DRAPER,
For Plaintiff.
T. B. TURLEY,
For Def'd'ts.

41 The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summon the mayor and aldermen of the town of Dyersburg, citizens of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit, for the eastern division of the western district of Tennessee, at Jackson, in said district, on the fourth Monday in April next, and then and there to answer Extein Norton, citizen of the State of New York, in a plea of debt, to the damage of the said plaintiff (as *they* says) eighty thousand dollars. Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at said Jackson, this fifth day of October, A. D. 1883, and the 107 of American Independence.

[SEAL.]

BELL W. ETHERIDGE, *Clerk,*
By DAVID H. HAYNES, *D. C.*

Know all men by these presents that we, Extein Norton and Poston & Poston, *and* held and firmly bound unto said defendants, The Mayor and Aldermen of the Town of Dyersburg, in the sum of two hunded and fifty dollars, but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendants; and also on failure of the said plaintiff to prosecute *he* said suit with effect; and also on failure of the defendants, if convicted, to pay said costs.

Witness our hands and seals this 5th day of Octo., A. D. 1883.

EXTEIN NORTON, [SEAL.]
By POSTON & POSTON. [SEAL.]
POSTON & POSTON. [SEAL.]

Approved by and acknowledged before me the 5th day of October, A. D. 1883.

BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

(Endorsed :) No. 35. U. S. — court, western dist. Tennessee. Extein Norton *vs.* The Mayor & Aldermen of the Town of Dyersburg. Summons. Returnable to — term, 188–. —— ——, attorney. Returned and filed at Jackson on the 23 day of Octo., 1883. —— ——, clerk. —— ——, D. C.

At Dyersburg, Tenn., and on the 16th day of October, 1883, I executed the within by leaving a certified copy hereof, together with a certified copy of the declaration, with Beverly Thomas, mayor of the town of Dyersburg.

M. T. WILLIAMSON,
U. S. Marshal,
By W. H. NEAL, *Deputy.*

42 *Declaration.*

In the Circuit Court of the United States for the Eastern Division of the Western District of Tennessee, Holden at Jackson, Tenn.

EXTEIN NORTON

vs.

THE MAYOR AND ALDERMEN OF THE TOWN OF DYERSBURG, IN THE STATE OF TENNESSEE.

Extein Norton, who is a citizen of the State of New York, sues the Mayor and Aldermen of the Town of Dyersburg, which is a municipal corporation created and chartered by the State of Tennessee and located and having its situs in the county of Dyer, in said State, and in the western district of Tennessee, for the sum of eighty
43 thousand dollars, due upon the following bonds executed and issued by said corporation on the 10th day of May, 1873, upon and in pursuance of lawful authority conferred for that purpose on said corporation, viz: Bonds numbers five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, and forty (5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40), each for the sum of five hundred dollars, and all due and payable at ten years from the date thereof, to wit, on the 10th day of May, 1883.

44 Also on bonds numbered, respectively, 41, 44, 52, 53, 59, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, and 81, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, and 120, each for the sum of two hundred and fifty dollars, and due and payable at ten years from the date thereof, or May 10, 1883.

Also on bonds numbered, respectively, 121, 122, 123, 124, 133, 144, 150, 151, 152, 153, 154, 155, 156, 157, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 187, 188, 189, 190, 191, 192, 193, and 194, 195, 196, 197, 198, 199, 200, 201, 202, 209, 210, 211, 212, 213, 214, 215, and 216. Said bonds numbers 195, 196, 197, 198, 199, 200, 201, 202, 209, 210, 211, 212, 213, 214, and 215 have 17 coupons on each, each for $3.50, numbered from four to twenty, inclusive, No. 4 maturing May 10th, 1875, and the others at intervals of six months
45 after that date, No. 216 has 18 coupons, from 3 to 20, inclusive, for $3.50 each, No. 3 maturing November 10, 1874, and the others at intervals of six months thereafter, all for the sum of one hundred dollars, due and payable ten years from the date thereof, or May 10, 1883.

The said bonds were all payable to the holder thereof ten years after the date of same upon the condition that said Paducah and Memphis railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court-house in said town; and plaintiff avers that before the filing of this suit the said railroad was constructed to said town of Dyersburg and a depot of said railroad located within half a mile of the court-house in said town.

46 And also upon coupons from like bonds of the same series and numbered and maturing and for amounts, respectively, as follows, viz:

1 coupon from each of bonds 35 and 36, due May 10, 1874.

1 coupon from each of bonds 35, 36, 38, and 39, due November 10th, 1874.

1 coupon from each of bonds 35, 36, 38, and 39, due May 10, 1875.

1 coupon from each of bonds 35, 36, 38, and 39, due May 10, 1876.

1 coupon from each of bonds 35, 36, 38, and 39, due November 10, 1876.

1 coupon from each of bonds 35, 36, 38, and 39, due May 10, 1877.

1 coupon from each of bonds 35, 36, 38, and 39, due November 10, 1877.

1 coupon from each of bonds 35, 36, 38, 39, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34, due May 10, 1878.

1 coupon from each of above bonds, due Nov'r 10, 1878.

1 coupon from each of above bonds, due May 10, 1879.

47 1 " " " " " " " Nov. 10, 1879.

1 " " " " " " " " May 10, 1880.

1 coupon from each of above bonds, due Nov. 10, 1880.

1 " " " " " " " May 10, 1881.

1 coupon from each of bonds 35, 36, 37, 38, 39, 40, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34, due November 10. 1881.

1 coupon from each of bonds, 35, 36, 37, 38, 39, and 40, due May 10, 1882.

1 coupon from each of above bonds, due Nov. 10, 1882.

1 " " " " " " " May 10, 1883.

All of the above-described coupons are for the sum of seventeen & $\frac{50}{100}$ dollars each.

Also on 1 coupon from each of bonds 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, due May 10th, 1874, and 1 coupon from each of bonds Nos. 52, 53, 59, 86, 87, 88, 89, 90, 105, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, due November 10, 1874.

1 coupon from each of above last bonds and Nos. 41, 44, due May 10, 1875.

48 1 coupon from each of bonds 52, 53, 59, 86, 87, 88, 89, 90, 105, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 41, 44, due November 10, 1875.

1 coupon from each of above bonds, due May 10, 1876.

1 " " " Nov. 10, 1876.

1 coupon from each of bonds 52, 53, 59, 86, 87, 88, 89, 90, 103, 104, 105, 67, 68, 69, 70, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 113, 114, 115, 116, 117, 118, 119, 120, 41, 44, due May 10, 1877.

1 coupon from each of above bonds, due November 10, 1877.

1 coupon from each of bonds 52, 53, 59, 86, 87, 88, 89, 90, 103, 104, 105, 67, 68, 69, 70, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 113, 114, 115, 116, 117, 118, 119, 120, 41, 44, 64, 65, 66, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, and 81, due May 10, 1878.

1 coupon from each above bonds, due Nov. 10, 1878.

1 " " " May 10, 1879.

1 " " " Nov. 10, 1879.

1 " " " May 10, 1880.

1 coupon from each above bonds, due Nov. 10, 1880.

49 1 " " " " May 10, 1881.

1 " " " " and also Nos. 106, 107, 108, 109, 110, 111, 112, due November 10, 1881.

1 coupon from each of bonds 52, 53, 59, 86, 87, 88, 89, 90, 103, 104, 105, 67, 68, 69, 70, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 113, 114, 115, 116, 117, 118, 119, 120, 41, 44, 106, 107, 108, 109, 110, 111, 112, due May 10, 1882.

1 coupon from each of above bonds, due November 10, 1882.

1 coupon from each of above bonds, due May 10, 1883.

All of above last-described coupons being for the sum of eight & $\frac{75}{100}$ dollars each; also on—

1 coupon from each of bonds 121, 122, 123, and 124, due November 10, 1874.

1 coupon from each of same, due May 10, 1875.

1 coupon from each of same bonds, due Nov. 10, 1875.

1 " " " May 10, 1876.

1 coupon from each of same bonds, due Nov. 10, 1876.

50 1 coupon from each of bonds 121, 122, 123, 124, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 187, 188, 189, 190, 191, 192, 193, 194, 133, due May 10, 1877.

1 coupon from each of same bonds, due November 10, 1877.

1 coupon from each of above-numbered bonds and also Nos. 144, 150, 151, 152, 153, 154, 155, 156, 157, due May 10, 1878, and—

1 coupon from each of last-named bonds, due November 10, 1878.

1 from each of same, due May 10, 1879.
1 " " " Nov. 10, 1879.
1 " " " May 10, 1880.
1 " " " Nov. 10, 1880.
1 " " " May 10, 1881.
1 " " " Nov. 10, 1881.

1 coupon from each of bonds 121, 122, 123, 124, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 187, 188, 189, 190, 191, 192, 193, 194, 133, all due May 10, 1882.

1 coupon from each of same, due Nov. 10, 1882.

51 1 coupon from each of same, due May 10, 1883.

All of the above last-named coupons are each for the sum of three & $\frac{50}{100}$ dollars.

The plaintiff became the holder and owner of said bonds and coupons before their respective maturities for value and without notice of any defect or infirmity therein and in the due course of trade.

The said bonds and coupons are now here to the court shown, and, though due, are wholly unpaid, together with interest thereon, to plaintiff's damage, eighty thousand dollars, for which he now here sues.

PARKS & DRAPER,
HOLMES CUMMINGS, AND
POSTON & POSTON,
Attorneys for Plaintiffs.

52 Endorsed: Filed Oct. 5, 1883. Bell Etheridge, cl'k; W. B. Weiseiger, D. C.

Defendant's Plea.

In the Circuit Court of the United States for the Eastern Division of the Western District of Tennessee, Sitting at Jackson, Tennessee.

EXTEIN NORTON
vs.
MAYOR & ALDERMEN OF THE TOWN OF DYERSBURG.

And now comes the defendant corporation, by their attorney, and for plea in this behalf says—

53 It is not indebted to the plaintiff in the manner and form as the plaintiff in his declaration has alleged, and of this it puts itself upon the country.

SP'L HILL, *Att'y.*

And the defendant corporation comes and for further plea says that the bonds and coupons mentioned and sued on in the plaintiff's declaration in this cause are not the bonds or coupons of this defendant, and that neither of said bonds or coupons were ever executed by this defendant or by any one thereunto by this defendant or otherwise lawfully authorized to execute the same or any part of the same, and that neither one or more of said bonds or coupons is the act or deed of this defendant, and of this it puts itself upon the country.

SP'L HILL, *Att'y.*

54 Endorsement on plea: Oath waived. Poston & Poston, Parks & Draper, for plaintiff.

And plaintiff joins issue with defendant on the two foregoing pleas.

POSTON & POSTON,
PARKS & DRAPER,
Att'ys for Plaintiff.

Endorsed: Filed Octo. 23rd, 1883. Bell Etheridge, cl'k, by D. H. Haynes, D. C.

55 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its October term, A. D. 1884, at the United States court-house, in the city of Jackson, in said district, on, to wit, the 11th day of November, A. D. 1884, in the following cause, to wit:

EXTEIN NORTON, Plaintiff,
vs.
THE MAYOR AND ALDERMEN OF THE TOWN OF DYERSBURG, Defendant. } No. 35.

This cause was this day heard by the court under the written stipulation of the parties waiving a jury and agreeing that the court should try and determine all questions of law and fact in this cause, when the court found the issues of law and fact with the defendant, and it is therefore considered and adjudged by the court that the defendant go hence and recover of the plaintiff and his security the cost in this behalf expended, for which execution may issue; and thereupon the plaintiff moved the court for a new trial.

56 *Opinion of the Court.*

Circuit Court, Western District of Tennessee.

THOMAS GREEN *vs.* TOWN OF DYERSBURG.

JULY 5, 1879.

1. Municipal bonds, railroad subscription.—Where a town is authorized by statute to subscribe to the capital stock of a railroad company and is required to pay the subscription in "not exceeding" six annual installments, and is further authorized to anticipate the collection of taxes by issuing "short bonds" bearing six per cent interest:

Held that the proper construction of the act requires the bonds to mature at a date not longer than the assessment of taxes
57 are due and payable, and that bonds payable in ten years and bearing seven per cent. interest are unauthorized by the act. These requirements are not directory only, but imperative, and must be complied with by the town. The bonds on their face show non-compliance with the statute, and there can be no *bona fide* holder for value of such bonds.

2. Same, article 2, section 29, constitution of Tennessee.—Neither article 2, section 29, of the constitution of Tennessee of 1870, nor the act of January 23, 1871, chapter 50, code, 491*a*, passed to enforce it, confers any power upon municipal corporations to issue bonds in payment of a stock subscription to railroads. The only effect of that act is to require a three-fourths vote of the citizens of the
58 town as a prerequisite, and to designate the county court or the board of mayor and aldermen as the agents to execute whatever powers exist in the particular case. The powers must be found elsewhere in the statutes; nor does the first clause of the second sub-section of the act confer any power to issue bonds under the second clause of the sub-section relating to stock subscriptions, even if the first clause can be held to authorize in itself bonds to be issued, when "credit is given or loaned" in aid of a railroad. Giving or lending credit and subscribing stock are essentially different.

3. Same, act of 1842, chapter 117, code, 1142, *et seq.*—This act, as modified by the constitution and subsequent legislation, is the general law under which all corporations must act in subscribing
59 stock to railroads. It confers no express power to issue bonds in payment of the subscriptions, and unless such power is conferred by some other enactment no corporation can issue bonds in payment of a subscription to capital stock, but must pursue the requirements of this act. There is no statute conferring any express power on the town of Dyersburg to pay its subscription to the Paducah & Memphis Railroad Company's capital stock in ten-year bonds bearing seven per cent. interest, and none can be implied from the authority conferred upon it by this act and its amendments.

4. Same, implied power to issue bonds.—There is no implied power in a municipal corporation to issue negotiable bonds in pay-

ment of a debt which it is authorized to contract. No de-
60 cision of the Supreme Court of the United States or of the supreme court of Tennessee has so adjudicated, and in the absence of any controlling decision to that effect this court holds that the power must be expressly conferred or necessarily implied from some power given other than the bare authority to contract a debt for a particular purpose, whether it be a corporate purpose or not. Public safety requires that the implication in favor of such power shall not be extended beyond the point to which they have already gone. *Bona fide* holders will be protected against the irregular exercise of granted authority, but the authority itself should not be created by judicial decree upon unnecessary implication.

5. Same, conditions precedent.—Where a bond upon its
61 face promises to pay a sum of money to a railroad company "upon the express condition, however, that said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court-house in said town," it is a condition precedent to the payment of the money and not a mere covenant of the railroad company to so construct the road, for the breach of which compensation in damages is the remedy. No holder of the coupons can recover on them without showing either the performance or a readiness to perform the condition. The bond itself charges the purchaser with notice of the condition, and it is he that trusts the railroad company and not the town.

6. Same, rules of construction.—It is a universal rule of
62 construction of such instruments that the actual intention of the parties will prevail over that reached by any technical rules prescribed for ascertaining the intention, and therefore neither the rule that if part of the money be payable before the covenant on either side is to be performed nor the other rule that if the promissor has received part of the consideration the covenants shall be held to be independent of each other will override the intention manifested by the contract that the railroad should be built before the money can be demanded. These rules have always yielded to a clear manifestation of a different intention. The rule as to payment by installment does not apply to installments of interest, but only where the principal is so payable. The rule as to part
63 performance does not apply where the part unperformed is the essential consideration.

7. Same, reasonable time.—If no time be specified for the performance of the condition to construct the road the law implies a reasonable time; and when the amendment to the charter of the company of January 27, 1870, chapter 49, section 5, required the road to be completed within seven years from that date this will be taken as the time within which the condition should be performed, the bonds being dated on the 10th of May, 1873, and subsequent to the amendment.

On the 21st day of March, 1878, in the United States circuit court, at Memphis, this suit was brought upon past-due coupons of bonds

issued by the town of Dyersburg, of which the following are samples, both of the bonds and coupons:

64 (Coupon $8.75.)

The mayor and aldermen of Dyersburg, Tenn., will pay the bearer, on the 10th day of Nov., 1873, eight dollars and seventy-five cents, being the semi-annual interest due on Paducah & Memphis Railroad bond No. 9654.

C. P. CLARK, *Mayor.*
W. C. DOYLE, *Recorder.*

(Bond No. 9654.) ($250.00.)

The mayor and aldermen of the town of Dyersburg, in the State of Tennessee, a corporation duly chartered by act of the General Assembly of the State of Tennessee, by the qualified voters of said town, under the provisions of an act of the Legislature empowering them so to do, by this bond promise to pay to the holders thereof, ten years after the date thereof, the sum of two hundred and fifty dollars, with interest at seven per centum per annum from
65 this date, payable semi-annually at the city hall in Dyersburg on presentation of the coupons hereto attached, to aid in the construction of the Paducah & Memphis railroad, upon the express condition, however, that the said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court-house in said town.

In testimony whereof, etc., this the 10th day of May, 1873.

[SEAL.] C. P. CLARK, *Mayor.*
W. C. DOYLE, *Recorder.*

The defendant corporation filed six pleas to the declaration:

1. The first plea sets out the application of the railroad company for a subscription of $50,000 to its capital stock, to be paid in ten-year coupon bonds, at seven per cent. interest, to aid in the
66 construction of the road through Dyer county; the passage of an ordinance submitting the proposition to the voters of the town to subscribe and pay for the stock upon certain conditions among others the following: "The above subscription is made on the condition that the Paducah & Memphis railroad is to be located and built to Dyersburg and a depot of said road to be located within one-half mile of the court-house, without which condition, accepted by the said railroad company, this subscription to be void and no bonds shall be issued, and this condition shall be written or printed, if deemed necessary by the mayor, on the face of said bonds. The acceptance by the officers of said railroad company of any portion of the bonds herein authorized to be
67 issued shall bind said company fully to the terms and conditions of said subscription, as set forth in all the sections of this ordinance; the ratification of this proposition by the voters at an election; the passage of an ordinance authorizing the mayor to subscribe for the stock upon the conditions imposed by the ordi-

nance; the application to the company to subscribe on the terms and conditions mentioned; the acceptance by it of the proposition and the spreading on the minutes of the railroad company of the proceedings of the board of mayor and aldermen of the town at the time of this acceptance." The plea then avers that the conditions upon which the town was authorized to become a stockholder have
68 never been complied with by the railroad company, without which the defendant corporation had no authority to issue the bonds, and the coupons sued on are not its act and deed.

2. The second plea is a simple plea of *non est factum.*

3. The third plea, after setting out the same facts as those stated in the first plea, avers that the bonds had printed on their face the said conditions in the following words, to wit: "Upon the express condition, however, that said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot located within half a mile of the court house in said town;" that there was no other or different authority to issue the bonds, and no other or different consideration than that set out in the plea;
69 that the bonds were delivered to the plaintiff or his assignors by the railroad company without the knowledge of or consent of the defendant corporation and without any authority from it; that at the time of said delivery the company had not built its road to Dyersburg nor located a depot within half a mile of the court-house, nor has it at any time since done so, of all which the plaintiff had notice; that the coupons sued on are the coupons of the said bonds and none other; that the stock of the company had become worthless and the corporation dissolved by the foreclosure of a mortgage made by it and on the purchase of its property and franchises by a new company, and, therefore, that the con-
70 sideration had wholly failed, of which plaintiff had notice.

4. The fourth plea craves oyer of the coupons and bonds and sets them out *in hæc verba,* and then avers that the defendant corporation had never been authorized by any law of the General Assembly of the State of Tennessee, nor by any election of the qualified voters of the town, to lend its aid to said railroad company by the issuance of the bonds aforesaid, as required by the 29th section of article II of the constitution of the State, of which plaintiff had notice.

5. The fifth plea craves oyer and sets out the bonds and coupons, and avers that the whole series of $50,000 bonds was delivered to the railroad company on the express condition that they were
71 not to be negotiated, nor to become due and payable except upon the express condition that the railroad should be constructed to the town of Dyersburg and a depot located within half a mile of the court-house, and avers that this has never been done.

6. The sixth plea avers that the defendant corporation did not undertake and promise in manner and form, etc., to which plaintiff has joined issue.

The plaintiff demurs to the first five pleas and assigns the following grounds:

1. To the first plea, that the conditions mentioned that the railroad

should be built to Dyersburg and its depot located within half a mile of the court-house were not conditions the execution or performance of which were precedent to the issuance of the bonds nor to the liability of the defendant on them, but only a condi-
72 tion that the company should accept the terms of the subscription by agreeing to build the road to the town and locate the depot within half a mile of the court-house.

2. To the second plea, that being a plea of *non est factum* it is not sworn to.

3. To the third plea, first, the same ground of demurrer as that taken to the first plea, as above stated, viz., that the plea shows that the company accepted the terms of the subscription, which was the only condition precedent to the issuance of the bonds, as shown by the plea; second, that the plea is double in pleading a want of compliance with an alleged condition precedent, and at the same time a failure of consideration; third, that on the averments of the plea itself the plaintiff is shown to be an innocent purchaser for value without notice.

73 4. To the fourth plea, that on the face of the plea it is shown that an election was held and that the Legislature of Tennessee had by law authorized the bonds to be issued.

5. To the fifth plea, that it appears by the plea that the plaintiff was an innocent purchaser for value without notice.

The charter of the railroad company authorizes corporations, cities, and counties to subscribe stock, but contains no authority for municipal corporations to issue bonds unless it is implied from the power to subscribe. Chap. 42, § 30, acts 1858, p. 79. The general railroad subscription laws, authorizing all counties and incorporated towns to subscribe for stock, contains no express power to issue bonds in payment of such subscriptions, but requires the levy of a tax
74 to meet the installments of subscription as made, and directs the tax collector, as fast as he makes collections, to pay the amounts over to the company; and to meet unexpected contingencies, the corporation may anticipate the collection of the railroad tax by issuing warrants bearing six per cent. interest, payable at such times as may be desired by the railroad company, the warrants to be received in payment of the stock. Thomp. & Steg. Code, §§ 1142–1165. By an act of March 13, 1868, ch. 72, S. 4, § 1148 of the code was amended by adding to it the words "and shall issue the bonds when called for;" and by an act (found among the private acts) of December 9, 1868, ch. 11, S. 26, said § 1148 was subsequently and further amended by omitting the words "and shall issue the bonds when called for," thereby leaving the section as it was before the amendment of March 13, 1866, except as to matter not pertinent
75 here. By section 29, art. II, of the constitution of 1870, which went into effect May 5 of that year, it is ordained that "the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election; nor shall any county, city, or town become a stockholder

with others in any company, association, or corporation except upon a like election and the assent of a like majority." The act of January 23, 1871, entitled "An act to enforce section 29, article II, of the constitution," ch. 30, Thomp. & Steg. Code, 491*a*, enacts that the counties and incorporated towns in the State may impose
76 taxes for county and corporate purposes upon the conditions named therein, one of which is: "Second. The credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation except, first, upon the consent of a majority of * * * the board of mayor and aldermen * * * of such city or town, and upon an election afterwards held by the qualified voters of said * * * city or town and the assent of three-fourths of the votes cast at said election, * * * and if the assent of three-fourths of the voters of such * * * city or town is had, then the * * * board of mayor and aldermen * * * shall have full power to make and execute all necessary orders, bonds, and payments in order to carry out such loan or credit voted for as prescribed in this act; nor shall any county, city, or town become a stockholder with others in any company,
77 association, or corporation except upon a like election and the assent of a like majority as prescribed in this act."

By the act of February 26, 1869, chap. 59, § 20, it was enacted, "That it shall be lawful for the town of Dyersburg to make a corporate subscription to the capital stock of the Mississippi River Railroad Company (afterwards the Paducah & Memphis Railroad Company) not to exceed fifty thousand dollars in amount, payable, in not exceeding four years, by annual assessments levied by the board of trustees of said town and collected as other moneys are, and bonds of the town may be issued in anticipation of such collections collected for town purposes," with a proviso that there shall be a previous election and the subscriptions authorized by a majority vote.

78 By the act of February 8, 1870, chap. 55, § 18, relating to the subscription of Haywood and Dyer counties to the Brownsville & Ohio and to the Mississippi River Railroad Companies, it was enacted, "That stock which had been subscribed or may hereafter be subscribed by any county, city, or incorporation to said railroad companies may be made payable in six annual payments; and it shall be lawful for county courts and the corporate authorities of any city or town making such subscription to issue short bonds, bearing interest at the rate of six per centum per annum, to said railroad companies in anticipation of the collection of annual levies, if thereby the construction of the roads can be facilitated."

By the act of December 16, 1871, chap. 122, where an election previously held had authorized a subscription to the capital
79 stock by as much as three-fourths of the qualified voters, so that the election would be within the constitutional requirement as to the number of votes to authorize a subscription, "such subscription shall be deemed a valid and legal subscription," notwithstanding the same was in excess of the amount authorized by the code, §§ 1142 *et seq.* This act also allowed a new vote to be

taken in case of doubt, and by the act of December 15, 1871, chap. 129, these sections of the code were still further repealed and modified as to the restrictions on the amount of subscriptions authorized, but neither of these acts authorize- in terms any bonds to be issued.

The averments in the pleadings do not show that anything was done under the special act of February 20, 1869, chap. 59,
80 § 20, but it is stated in argument and does appear by the record of the proceedings of the town, which is referred to in the pleas, that on the 12th day of September, 1871, an election was held authorizing a subscription to this railroad company of $50,000, which "was held" to be illegal because excessive in amount, but it does not appear by said record of town proceedings that the subscription voted on that day was to be paid in bonds. This appears to be the fact, however, as to the election of July 5, 1872, on the result of which these bonds were in fact issued.

GREEN *vs.* TOWN OF DYERSBURG.

Humes & Poston and J. P. Meux for plaintiff; Harris, McKissick & Turley for defendant.

81 HAMMOND, *J.:*

Some of the grounds of this demurrer, as stated, are rather in the nature of replications, but I shall treat it as raising the questions made in the argument.

The first question is as to the power of the town to issue these bonds. The supreme court have declared that "a municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril." Ottawa *vs.* Perkins, 94 U. S., 260–262. And they are equally invalid in the hands of innocent purchasers. Marsh *v.* Fulton County, 10 Wall., 676. The argument of the defendant's counsel denying the legislative authority to issue these bonds is based upon a distinction between paying for a subscription to the capital stock of the railroad company by levying taxes
82 and paying the money and issuing bonds in payment of the subscription, and it is contended that, there being no express power granted to issue bonds in payment of subscription to stock, none will be implied, and the case of the Police Jury *v.* Britton, 15 Wall., 566, and the cases cited in Dillon on Municipal Corporations, § 407 and note, and Folsom *v.* School District, 11 Chicago Leg. News, 226, are relied on. The plaintiff contends that the statutes referred to in the statement of the case confer express power to issue these bonds, and, if not, then that the power is a necessary implication from the authority given to make the subscription to the capital stock of the railroad company.

The act of March 13, 1868, amending the code would undoubtedly have been sufficient to support these bonds if it had not been
83 subsequently modified by the act of December 9, 1868, chap. 11, § 26. The act of December 16, 1871, does not confer any new power or enlarge the powers of the town in the matter of issuing bonds. It clearly contemplates subscription under the code, §

1142 *et seq.*, and only removes the restrictions there found as to the amount allowed to be subscribed by the town. The recital in the record of the town proceedings, referring to the election of September, 1871, and the act of December 16, 1871, authorizing them to revote the subscription, shows conclusively that the town authorities supposed that they were making this subscription under the provisions of the code, § 1142 *et seq.*, as modified by the special acts relating to this particular town, as no doubt they were. Neither is there anything in the act of December 15, 1871, chap. 129,
84 which confers on this town the power to issue these bonds nor anything from which such power may be implied.

The act of February 26, 1869, chap. 59, § 20, as modified by the act of February 8, 1870, chap. 55, § 18, unquestionably authorizes the town to issue short bonds, whatever that may mean, bearing six per cent. interest, "in anticipation of the collection of the annual levies." By the very terms of these acts the subscription is payable in four or six years, and I think the proper construction is that the bonds shall not be longer running to maturity than the time within which the subscription is payable. The bonds are only to anticipate the annual collections of taxes to pay the subscription, which must all be paid "in not
85 exceeding" four or six years. The Legislature did not contemplate that the people should be burdened with a long debt, bearing interest from date, when the statute required that the taxes to pay the subscription should be levied and paid within a time specified in the act itself. If bonds were issued under the power conferred by these statutes necessarily they must be payable when the taxes levied to pay them are collected, for it is not to be supposed that the town would be required to levy and collect the taxes and keep them in the treasury idle to meet bonds maturing years after the collections are made. It is not like the case of Ross *v.* Anderson County, Supreme Court Tenn., MSS. Opinion,
86 1874, at Knoxville, not yet reported, where the statute authorized thirty-years' bonds to be issued and the county, in exact compliance with the statute, issued bonds for that time, but upon a vote of the people proposing to pay the subscription in six annual installments. At the time the vote was taken in that case the statute made no other requirement as to the time of payment than that not more than thirty-three and one-third per cent. of the subscription should be collected in one year. Act 1852, chap. 117, § 8, Code, § 1154. Here the requirement of the statute was that the amount should be paid in six years. There a subsequent statute varied the terms which the vote had fixed. Here the vote varies the terms which the statute has fixed. Nor is this like the case of L. & N. R. R. Co. *v.* Davidson County, 1 Sneed, 634, where it was held that the
87 act of 1852 did not prohibit the county from making more than three installments. A comparison of section 8 of the act of 1852, chap. 117, with section 20 of the act of 1869, chap. 59, and with section 18 of the act of 1870, chap. 55, shows that while under the act of 1852 there was no other restriction than that the time was not to be less than three years under the two latter acts the time

fixed is "not exceeding" six years. This is the necessary construction of the two acts of 1869 and 1870 taken together, even if it be admitted that the act of 1870, applying to "any city or incorporation," was intended to modify the special act of 1869 applying only to the town of Dyersburg. In this view the departure from these acts cannot be regarded as falling within the fourth resolu-
88 tion of the court in R. R. Co. *v.* Davidson County *supra*. The principle of directing statutes cannot be applied here and the authority conferred must be pursued in its material requirements. Winston *vs.* T. & P. R. R., 1 Baxter, 61.

Besides these acts only allowed six per cent. interest and the bonds here bear seven per cent. This cannot be a change within the discretion of the town to make; it is an additional burden, not a beneficial modification of the requirements of the statute. I am not unmindful of the conventional interest act of February 23, 1870, chap. 69, allowing an increase by contract to any rate not greater than ten per cent. It will be observed that the first of these Dyersburg acts fixed no rate of interest for the bonds, and the second,
89 limiting the rate to six per cent., was passed only a few days before the conventional rate of interest act just referred to, the latter being a general public law and the former a special private act. I do not think, under the general law, the town could enlarge the rate of interest. It was a municipal corporation acting under a special grant of power, which could not be exceeded. The result is that these bonds, being for a longer time and greater rate of interest than allowed under these two acts, cannot be supported by them. Bell *v.* R. R. Co., 4 Wall., 598; New Albany *v.* Burke, 11 Wall., 96. The case does not come within the case of Rock Creek *v.* Strong, 96 U. S., 251, and Marion County *v.* Clark, 94 U. S., 278, where there was a substantial compliance with
90 the legislative requirement. Dillon on Municipal Corporations, § 414. It may be that if the bonds had been issued according to the terms of the act they would be valid, *pro tanto*, for six per cent. interest, as ruled in Quincey *v.* Warfield, 25 Ill., 317; but, in the exercise of these special powers to impose the burdens of taxation upon a community, corporations should be held to a strict exercise of them, particularly in view of the peril to which the community is subject by a fraudulent use of such powers. Any purchaser of these bonds on looking to these statutes would see at once that the bonds were not such as the statute contemplated. Marsh *v* Fulton Co., *supra*. The remaining claim for express power to issue these bonds is based on the act
91 of January 23, 1871, chap. 50, code, § 491*a*. It is argued for plaintiff that the last clause of the second sub-section of section 1 of that act authorizes a town to subscribe for stock, and that the clause immediately preceding authorizes the board of mayor and aldermen to issue bonds in payment. It is manifest, however, that this construction is strained and wholly unauthorized by either the grammatical structure of the section or by any natural interpretation of it. The section follows identically the language of the constitution in its restrictive clauses, and it is evident that both intend

to indicate two corporate methods of giving aid to other persons or corporations; one of these methods—that of becoming a stockholder in a company—had been, so far as relates to encouragement of
92 railroad building by stock subscriptions, regulated by a general law since the act of January 22, 1852, chap. 117, often, however, modified by special acts in particular cases, § 1142, *et seq.*; the other method—that of giving or lending the credit of the city or town—had never been the subject of any general statute, and was always regulated by special acts in particular cases. The two methods are entirely distinct in their nature and essential ingredients. L. & N. R. R. Co. *v.* State of Tennessee, 8 Heisk, 663, and cases cited *arguendo*, p. 667. It happens that, as to railroad building, they both aid and encourage it; but the constitution and the act apply to all corporate contracts within the scope of "corporate purposes," and to none other. Neither confers any authority either to lend, credit, or subscribe stock; but if the authority exists elsewhere this act regulates its exercise
93 according to the constitution and designates the county court or the board of mayor and aldermen as the agents who shall issue the bonds when credit is lent or given. The validity of these railroad bonds and subscriptions all depend on the construction given by the supreme court to the old constitution, that the promotion of railroads is a legitimate "corporate purpose," and not upon any legislative power to authorize corporations to engage in extraneous enterprises. Nichol *v.* Nashville, 9 Humph., 250; L. & N. R. R. Co. *v.* Davidson County, *supra*. Interpreting the constitutional restrictions of 1870 and this act passed to enforce them by the previous legislative and judicial decisions, this giving or lending the credit of a county, city, or town to some other person,
94 company, association, or corporation means supporting the credit of such other person, etc., by guarranties, indorsements, or contracts of like character, and possibly donations or loans in aid of the enterprise, which must be a corporate purpose. Dillon Municipal Corp., § 393; Nichol *v.* Nashville, 9 Humph., 250, and cases cited in Cooper's edition; L. & N. R. R. Co. *v.* Davidson County, *supra*. The credit cannot be given or lent nor the subscription be made upon the authority of this act, for it confers none. It regulates in certain respects the general subject and harmonizes all the statutes with the constitution. When the corporation subscribes for stock it must follow the general law on that subject or some special law provided for it. The only effect of this act or the constitu-
95 tional provision referred to in it on the general law, and it so affects all special laws as well, is to abrogate all provisions allowing the subscription for stock to be made on less than a three-fourths vote of the qualified electors voting at the election in favor of it. In all other respects the statutes authorizing subscriptions remain as they were before this act was passed. I am therefore of opinion that there is no express authority given by any statute to the town of Dyersburg to issue these bonds.

It is insisted by the plaintiff that there is a power to pay the subscription in bonds to be implied from the authority to make the

subscription, whether we look to the authority as contained in the railroad charter or to the general law authorizing such sub-
96 scriptions. The authorities on this question are conflicting. Dillon on Mun. Corp., §§ 83, 106; Dillon on Municipal Bonds, § 62; Daniel on Negotiable Instruments, §§ 1530, 1532, 1533. I do not think there is any case decided by the Supreme Court of the United States which supports such an implied power under a general law containing the restrictions found in these Tennessee statutes. Code, §§ 1142–1165. And where the mode of payment is pointed out, as is done here, I hold that any other mode is excluded, and that a bare power to subscribe for stock does not imply a power to pay for it in negotiable bonds issued to the railroad company on such terms as the parties may agree upon. The intimation in Hitchcock *v.* Galves-
ton, 96 U. S. 341, if it does not militate against such an
97 implied power, is the latest indication in favor of it, but I find no decision of that court sustaining it. In Seybert *vs.* Pittsburgh, 1 Wall., 272, the implication was upon an act authorizing a subscription "as fully as an individual," and in Meyer *v.* Muscatine, 1 Wall., 384, the implication was upon a power "to borrow money," coupled with a general law authorizing railroads "receiving bonds of any city" to sell them at a discount. *Id.*, 221. In Rogers *v.* Burlington, 3 Wall., 654, and Mitchell *v.* Burlington, 4 Wall., 270, the implication was upon a power "to borrow money for any public purpose," and in Smith County *v.* Sac., 11 Wall., 139–156, The statement of the proposition appears in the dissenting opinion only, the case being decided on other grounds. In Lynde *v.* The County,
98 16 Wall., 6, the implication was upon a statutory power to borrow money. In the Tennessee statutes now under consideration there is no power given to borrow money nor to subscribe for stock as fully as an individual. On the contrary, the subscription for stock is regulated by a statute prescribing the mode of payment. The power to borrow money will not be implied. Mayor *v.* Ray, 19 Wall., 468–475.

It may be doubted if any case hereafter will extend this implication of power to issue bonds any further than it has already gone. 2 Daniel on Negotiable Instruments, ss. 1523–1532; Dillon on Mun. Bonds, s. 6.

The legislative construction in Tennessee is against any such implied power, and ever since the act of January 22, 1852, granting power to subscribe stock as therein specified, it has been the
99 constant practice to confer express power to issue bonds to pay for stock subscriptions whenever thought advisable, as was done by the act of December 30, 1853, amending the general act of January 22, 1852, to allow Sumner county to pay her subscriptions. L. & N. R. R. *v.* Davidson County, 1 Sneed, 661.

Very many such acts have been passed, and, as we have seen, there is special legislation as to Dyersburg. This would seem to exclude any legislative sanction of the doctrine of an implied power based on the general authority given to make these subscriptions. It is said by the supreme court of Tennessee in Moss *v.* Harpeth Academy, 7 Heisk., 238, of a private corporation, that there is an implied power

to borrow money to carry out the purposes of its organization, and it is shown by a note to that case that other courts have ap-
100 plied this doctrine to municipal corporations, notably the case of the Bank *v.* Chillicothe, 7 Ohio, 358, cited by counsel here; and see also Dillon Mun. Corp., ss. 106–107, and notes, and s. 407.

There seems to me to be a vast distinction between using private funds and implying this power to borrow money upon negotiable bonds against a body of people who have organized a municipal corporation with limited powers of taxation for special purposes; yet the supreme court of Tennessee have said, in the case of Adams *v.* M. & L. R. R. Co., 2 Coldw., 645–650, that there is an implied power to borrow money for corporation purposes belonging to municipal corporations; and, relying upon the settled doctrine in Tennessee that railroad building is a corporate purpose, the learned counsel for plaintiff presses with great earnestness the doc-
101 trines of that case. We are asked upon its authority to imply a power to borrow money for this corporate purpose, and then, again, to imply from the power to borrow money the power to issue negotiable bonds.

In Nashville *v.* Ray, 19 Wall., 479, it is said that this declaration of the supreme court of Tennessee in Adams *v.* M. & L. R. R. Co., *supra*, was not necessary to the decision of the case, as it clearly was not. The case of Nichol *v.* Nashville, *supra*, does not support the implied power to issue bonds where authority to subscribe stock is given under a statute appointing the mode of payment. In that case there was express power to issue the bonds, and even if it had been necessary to their support to rely on any implication of power the charter of the railroad company in that case authorized corporations to subscribe stock "with all the rights of any other stock-
102 holder." This is directly within the case of Seybert *v.* Pittsburgh, *supra*, where the words were "as fully as any individual." Here there are no such words, either in the railroad charter or in the act of 1852, under which this town acted. There are decided expressions in the case—pp. 262, 263—in favor of powers of construction, but confessedly they did not arise, and we have the authority of the same court for saying that "the reasoning, illustrations, or references contained in the opinion of a court are not authority, not precedent, but only the points in judgment arising in the particular case before the court." L. & N. R. R. Co. *v.* Davidson County, *supra*. The case of Ross *v.* Anderson County, *supra*, is much relied on by plaintiff. This is also a case in which there was express power to issue the bonds, and they were issued in exact con-
103 formity to the statute. There is a very strong expression in the opinion in this case in favor of the incidental right to issue bonds or other commercial evidence of debt wherever the power to contract is given, but it is manifest that the case is not an adjudication on the point, and it could not have been, for there was no want of a positive grant of power to issue the bonds, and the decision is put upon that ground. I am unwilling to adjudicate in the absence of a controlling authority that a municipal corporation has power to issue coupon bonds in payment of any debt it is authorized

to contract. No case that I have found decided, either by the United States Supreme Court or the supreme court of Tennessee, has gone that far as an adjudication; and after a most patient and deliberate examination of the subject I am of the opinion that the
104 defendant corporation had no power to issue these bonds to be implied from the authority to subscribe stock. This judgment is supported by the reasoning in the case of Ganse *v.* Clarksville, 19 Alb. Law Journal, 253, where the question is examined by Judges Dillon and Treat upon authority and principal.

The opinion of one of the learned judges in that case, as shown in the second division of the opinion, would seem to be against the views here expressed; but I think there is here in Tennessee no universal practice to issue bonds without special authority, as in Missouri, in payment of stock subscriptions; and I have endeavored to show that the United States Supreme Court have not yet decided in favor of any such implication of power. Until it decides the point I cannot yield my own strong convictions against the doctrine
105 acquired by this investigation. I have also considered the other questions raised by the pleadings as to the effect of the condition mentioned in the face of the bond. These coupons not containing on their face the condition expressed in the bonds, unless the reference to the number of the bond is to be so taken, the first question argued is whether they are affected by the recital in the bond. If this can be regarded as an open question since the case of McClure *v.* Oxford, 94 U. S., 429, it is not raised by the demurrer. Harshman *v.* Bates County, 92 U. S., 569. The third, fourth, and fifth pleas aver that the plaintiff had notice of the condition and its breach. He may have had such notice otherwise than by the expression of this condition on the face of the bond. The demurrer admits this averment of notice, and the only question is
106 whether the facts stated constitute a defense. It is not denied by the plaintiff that if this be a condition precedent to the payment of the bonds they are not negotiable, and are subject to all the defenses which could have been made against them in the hands of the original holder. Indeed, as the pleas charge notice of the failure to comply with the contract on the part of the railroad company, the case must be treated as if the railroad company itself were the plaintiff. So many decisions have been made upon the vexed question of what are and what are not dependent covenants that, being irreconcilable with one another, they rather perplex than aid the judgment in determining a given case. That the intent of the parties is to control is a universal rule. Officer *v.* Sims, 2 Heisk., 501; Grant *v.* Johnson, 5 N. Y., 247–255. The intention is to be ascer-
107 tained from the contract; there is nothing technical in it. The parties have a right to make their agreements dependent or independent, and as they make them the courts are bound to enforce them. Clermont County *v.* Robb, 5 Ohio, 491. Where parties have made an express contract none can be implied is an axiom in the law particularly applicable to this subject. Cutter *v.* Powell, 2 Smith's Lead. Cases, 207; Hudson Canal Co. *v.* Penn. Coal Co., 8 Wall., 276. In the notes to Pordage *v.* Cole, 1 Wms. Saunders,

319–320*a*, Seargent Williams has deduced from the cases certain rules for ascertaining the intention, which have all the force of judicial decision because they have been referred to and adopted by almost every court considering the subject from that day to this;
but in the application of these rules the courts have great
108 difficulties, and there is no subject in our jurisprudence more beset with conflicting decisions. The difficulty is determining whether one promise be the consideration for another or whether the performance and not the mere promise be the consideration. As in this case, was the construction of the railroad to Dyersburg or the undertaking of the company to construct it to that place the consideration of these bonds? It is said that this is to be determined by the intention and meaning of the parties as shown in the face of the instrument and by the application of common sense to each particular case. Chitty on Contr., 11 Ed., 1082; Stavers *v.* Curling, 3 Bing., N. C., 355; S. C., 32, E. C. L., 159; Taylor *v.* Mason, 9 Wheat., 327. The court will not confine itself to particular expressions, but will collect the intention from the whole instrument. Chitty
109 on Contr., 122. And every part must have its effect. *Ibid;* Herschel *v.* Mahler, 3 Denio, 428, 431; Haywood *v.* Perrin, 10 Pick., 228. Where there are mutual covenants or acts they are construed to be dependent, unless a contrary intention appears, and there is good sense as well as practical convenience in the rule. McNeill *v.* Magee, 5 Mason, 244, 255. The Supreme Court of the United States have said that although many nice distinctions are to be found in the books upon the question "whether the covenants on promises of the respective parties to the contract are to be considered independent or dependent, yet it is evident the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration nor the purchaser to part with his money without an equitable return." Bank of Columbia *v.* Hagner, 1 Pet. 455–465.
110 This is said in a case of vendor and vendee of an estate, but it applies as well to all contracts. It is undoubtedly true that in all cases involving the forfeiture of estates, and perhaps in ordinary commerical contracts, where the language of an agreement can be resolved into a covenant, the judical inclination is to so construe it; and where a party has another remedy for an injury inflicted by the non-performance of a condition, which may be compensated in pecuniary damages, he will be remitted to that remedy. Passchall *v.* Passmore, 40 Penn. State, 295, 307.

The reason of this distinction is stated to be that the other consideration prevents the court from dealing out justice to the parties according to the equities of the case. Railroad Co. *v.* Butler, 50 Cal.,
575. But this doctrine appertains rat-er to courts of equity
111 than those of law, and can never be invoked to destroy the clear intention of the parties and where the enforcement of the rule would operate to inflict injustice on the other side. In a case like this there can be no compensation in damages. How could this town be compensated in damages by a failure to build a rail-

road to it? Nothing less than money enough to build the entire road from Paducah to Memphis would answer as compensation in case of total failure to build it. The object of this subscription was to secure the road to that town, and whatever they may have technically expressed by their contract I have no doubt they intended to secure the construction of this road by making their contribution dependent upon the performance of the condition and did not intend to rely upon any mere covenant on the part of the railroad company secured against a breach by an action for damages.

112 Where the acts stipulated to be done are to be done at different times the stipulations are to be construed as independent of each other. Goldsborough *v.* Orr, 8 Wheat., 217. This rule is not inflexible, but yields wholly or in part to the intention of the parties and the good sense and equity of the case. Cunningham *v.* Merrell, 10 Johns., 203, and cases cited in note to Wilks *v.* Smith, 10 M. &. W., 360, by Hare and Wallace.

A more practical test for all cases is whether the defendant reasonably appears to have looked to the plaintiff's covenant or to its performance as the consideration and condition of his being bound. *Ibid.* Here, however, no time is fixed for building this railroad to Dyersburg. The law that a reasonable time was intended to be given. Chitty Contr., 1062; Davis *v.* Gray, 16 Wall., 204–231; Cooke *v.* Taylor, 2 Tenn., 49. The act of January 27, 1870, chap. 49, sec. 5, allowed seven years from the date of the act for the completion

113 of the road. The bonds being issued subsequent to that amendment, the parties are supposed to have contracted with reference to it, and this fixes the time within which this condition should have been performed, and it had expired when this suit was brought, and about six years before this money was payable, so that the rule operates the other way unless the fact that some of the coupons fell due prior to that time changes it. The town may have been willing to pay the coupons falling due prior to the date designated by statute as the time for the completion of the road, relying upon the security which the condition gave us to the remainder. They could make this contract if they chose, and we have seen that the rule yields to the actual intention.

There are some cases which hold that if part of the money be

114 payable before the act is to be done by the other side the respective promises are independent as to the installments of interest; but these cases have, in their peculiar facts, furnished other evidences of such intention, such as delivery of possession of the thing sold. Generally, however, the cases have been those where the principal money was payable in installments. Wilks *v.* Smith, 10 M. and W., 355; Mattock *v.* Kinglake, 10 A. and E., 50, 37 E. C. L., 37; Dicker *v.* Jackson, 60 E. C. L., 102; Edgar *v.* Boies, 11 S. and R., 445; Chitty Contr., 1082, and cases. It was held in Loan Association *v.* Topeka, 20 Wall., 656, that the mere payment of interest would not work an estoppel, and I think the application of this rule of part payments to installments of interest, aside from other controlling circumstances,

is a perversion of the rule itself, and often would operate to defeat the intention. It should only be applied when the mode of payment of the principal money indicates that the parties could
115 have had no other intention than that the promise should be independent. Gardner *v.* Corson, 15 Mass., 500, shows that annual payments of interest do not bring the case within the rule of payment by installments. The plaintiff here also relies on the rule that where an essential part of the consideration has been paid the party receiving it will not be allowed to defeat a recovery against him because some remaining portion of the whole consideration remains unperformed, the argument being that the town has received the stock of the railroad company for which it subscribed, and because the whole consideration has not been received it cannot refuse payment. Chitty Contr., 1092. This question might become important if the railroad company were in a position to tender performance of its undertaking, but the pleas aver that it has been foreclosed and its property and franchises sold under a mortgage. If a party has
116 disabled itself from fulfilling the contract, there is already a breach, and the contract is at an end. Chitty on Contr., 1079–1084. And the non-performance of one part of a contract is not excused by showing performance of another part. *Idem*, 1079; Cutter *v.* Powell, 2 Smith's Lead. Cases, and notes, is a case that discusses this doctrine; and it will be found that the rule does not apply where the main and essential part of the consideration remains unperformed. Here the chief consideration was the railroad facilities to be acquired by the construction of the road to the town. It is well known that in these days stock in railroad companies, as property, is not of much value, and the shares are not, in this class of cases, any very essential part of the consideration. The case of Humboldt *v.* Long, 92 U. S., 642, is not like this case.

The bond did not show any condition, and therefore the
117 subsequent use of the words "upon the performance of this condition" had no force. If the bond had said "payable upon express conditions that the road be constructed through the township," it would have been this case, but it does not so say. In Pendleton County *v.* Amy, 13 Wall., 305, the condition was precedent to the issuance of the bonds, and its performance was presumed from the recitals in the bonds and the fact of their issuance. But here the condition is attached to the payment of the money.

Usually these bonds are issued in aid of the road without incumbrance as to conditions, and it would have been better for the railroad company had these bonds been so issued; but the parties could attach this condition to their contract, and the bonds were not valueless if the condition has been performed.

It was simply a transfer of confidence in the railroad com-
118 pany from the town to the capitalist who takes the bonds. It is he who trusts the railroad company in this case, and not the defendant corporation. It was a wise contract on the part of the town, and it has taken the precaution to inform persons dealing in the bonds of the fact that it had attached the condition to the con-

tract by this recital. The language of the proposition, as voted, and the proceedings of the town authorities do not indicate any other condition than that shown on the face of the bond; but if they did the expression in the bond itself is not ambiguous. The case of Miller *v.* Pittsburg R. R. Co., 40 Penn. St., 237, falls directly within the case of a contract for payment before the road was to be built, and to build it. The principal money—the subscription itself—
was all due two years before the road suspended. Here it is deferred for ten years, and the charter of the company
119 required the road to be completed six years before these bonds were due. The case of Brooklyn *v.* Ætna Life Ins. Co., decided by the United States Supreme Court, October term, 1878, (not yet reported); 11 Chicago Legal News, 319; 8 Centr. Law Journal, 422; 19 Albany Law Journal, 361, is a clear recognition of this defense as a good one; and there can be no doubt that if the bonds in that case had on their face given notice, as in this case, the plaintiff would have failed.

The case of Conrad *v.* Portsmouth Savings Bank, 92 U. S., 625, is directly in point in favor of this opinion.

There the act of the Legislature attached the condition to the subscription; here the contract of the parties attached it. There the bonds were void; here the condition being broken the bonds became valueless.. The case of N. and N. W. R. R. Co. *v.* Jones, 2
120 Coldw., 574, is also an authority directly in favor of this conclusion.

The importance of this case demands and has received my most careful consideration, and the defenses set up have raised some of the most perplexing questions known to the law. This must be my apology for the delay in deciding it and the fullness of the opinion.

121 Demurrer overruled.

Which was overruled; to which the plaintiff then and there excepted, and tenders his bill of exception and prays that the same may be signed, sealed, and made a part of the record; all of which is accordingly done.

OFFICE OF THE CLERK OF THE
CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN
DIVISION OF THE WESTERN DISTRICT OF TENNESSEE.

I, Bell W. Etheridge, clerk of the circuit court of the United States for said division of said district, do hereby certify that the foregoing 121 pages contain a full, true, and perfect copy of the record and proceedings in the case of Extein Norton *v.* The Mayor and Aldermen of the Town of Dyersburg, as the same appears of record on the files in my office, together with a full, true, and accurate copy
122 of the opinion of the court delivered in the case of Green *v.* The Town of Dyersburg, ordered by the court to be certified as the opinion in this case.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this the 29th day of January, A. D. 1885.

{ Seal Circuit Court of the United States, Western District of Tennessee, Eastern Division. }

BELL W. ETHERIDGE, *Clerk*,
By DAVID H. HAYNES, *D. C.*

Endorsed on cover: W. Tennessee C. C. U. S. No. 207. Exstein Norton, plaintiff in error, *vs* The Mayor & Aldermen of the Town of Dyersburg, Tennessee. Filed February 23, 1885.

7-102

FILED
JAN 31 1888
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1887.

EXTEIN NORTON, PLAINTIFF IN ERROR,

vs. } No. 207.

MAYOR & ALDERMEN OF DYERSBURG, TENN.,
DEFENDANT IN ERROR.

In Error to Circuit Court of the United States for the Western District of Tennessee, at Memphis.

BRIEF AND ARGUMENT

OF

D. H. POSTON, W. K. POSTON,
PARKS & DRAPER, AND SMITH & COLLIER,
For Plaintiff in Error.

E. C. TOOF & CO. PRS. & LITHS., MEMPHIS.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this the 29th day of January, A. D. 1885.

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4-160

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vs.

MAYOR & ALDERMEN OF DYERSBURG, TENN.,
DEFENDANT IN ERROR.

In Error from Circuit Court of the United States for the Western District of Tennessee, at Memphis.

ASSIGNMENTS OF ERROR.

Plaintiff in error assigns the following errors to the judgment of the court below:

1st. The court erred when it ruled "That no legislative authority whatever existed for the issuance by said defendant of the bonds and coupons sued on in this cause," for the following reasons: Said bonds and coupons were issued in pursuance to and by virtue of paragraph 29, Article II, of the Constitution of 1870; the act of January 16, 1871, chapter 50, Acts of 1870 and 1871; the act of December 14, 1871, chapter 122, Acts of 1871, and chapter 129, Acts of 1871, under and by which due authority and power was given to and conferred upon defendant to make the subscription and execute the bonds and coupons in manner and form sued on herein.

2d. It erred when it refused plaintiff's request to find, "That, under the facts found, the defendant was authorized to execute, issue and deliver to said railroad company the said bonds;" for, outside and independent of the statutory and constitutional provision above referred to, the defendant, having the right to make the subscription and loan of its aid and credit to said railroad company, had the right to execute its bonds or notes evidencing the same, outside and independent of any express statutory authority, it being a matter incidental to its right to make the subscription and loan of its credit.

3d. It erred when it rendered its judgment for defendant and against plaintiff; for, having found that the subscription was validly made and voted, the certificate of stock delivered, the railroad built in the county, and depot established as agreed upon, and the whole consideration received by defendant for such subscription—the only irregularity being in the form of subscription, to-wit, that the bonds are negotiable instead of non-negotiable—it should have found that the bonds were valid obligations, and defendant liable, the court disregarding the excess of authority in making bonds negotiable, when they should have been non-negotiable.

D. H. POSTON,
W. K. POSTON,
PARKS & DRAPER, AND
SMITH & COLLIER,
For Plaintiff in Error.

Supreme Court of United States.

EXTEIN NORTON, PLAINTIFF IN ERROR,

vs.

MAYOR & ALDERMEN OF DYERSBURG, TENN.,
DEFENDANT IN ERROR.

Brief and Argument of D. H. Poston, W. K. Poston, Smith & Collier and Parks & Draper, for Plaintiff in Error.

FACTS.

This is a suit to enforce the collection of one hundred and sixty (160) of the bonds, with coupons attached, of the town of Dyersburg, Tenn., given in part payment for a subscription of fifty thousand dollars ($50,000) made by it to the Paducah & Memphis Railroad Company—all dated 10th day of May, 1873, and due at ten years, with seven (7) per cent. interest, the bonds being, in words and figures, to-wit:

Bond No. ——. *$250.*

The Mayor and Aldermen of the town of Dyersburg, in the State of Tennessee, a corporation duly chartered by act of General Assembly of the State of Tennessee, by the qualified voters of said town, under the provisions of an act of the Legislature empowering them so to do, by this bond promise to pay to the bearer hereof, ten years after date, the sum of two hundred and fifty dollars ($250), with interest at seven (7) per centum per annum from this

date, payable semi-annually at the City Hall, in Dyersburg, on presentation of the coupons hereto attached, to aid in the construction of the Paducah & Memphis Railroad; upon the express condition, however, that the said railroad shall be constructed to the town of Dyersburg, Tenn., and have a depot of said railroad located within half a mile of the court house in said town.

In Testimony Whereof, The Mayor and Aldermen of the town of Dyersburg, Tennessee, have caused this bond and the coupons attached to be signed by the Mayor of said town and countersigned by the Recorder, on this, the 10th day of May, 1873.

C. P. CLARK, *Mayor.*

SEAL. Mayor and Aldermen Dyersburg, TENN.

Countersigned:

W. C. DOYLE, *Recorder.*

See record page 11.

These bonds and coupons purport, on their face, to be the obligations of the defendant, and have thereon the impress of the corporate seal, and it is expressly agreed that they were executed and delivered by the proper authorities of the defendant; and the only defense relied on is want of legislative authority.

See Agreement of Counsel, par. 2, record p. 3.

The facts agreed to and found by the court are:

1st. That plaintiff Norton, the owner of the bonds and coupons sued on, bought same before due, for full value, and without any knowledge or notice of defect, informality, equity or condition against the liability of said town, unless the face of the bonds charged him with notice.

2d. That the bonds and coupons sued on were, as a matter of fact, signed, sealed and delivered by the proper authorities, defendant only insisting that there was a want of legislative authority so to do, the plea of *non est factum* only going to that extent.

3d. That defendant is a municipal corporation, within the jurisdiction of this court, with powers to sue and be sued, etc.

4th. That the Paducah & Memphis Railroad Company was the legal successor of the Mississippi River Railroad Company, and the Chesapeake & Ohio & Southwestern Railroad Company is the successor of the Paducah & Memphis Railroad Company.

5th. That said railroad was, at the date of the bringing of this suit, and is now, operated through the county of Dyer, and had then, and now has, its depot within half a mile of the court house in Dyersburg.

6th. That Exhibit B contains all the proceedings of defendant relative to the subscription that are necessary for the purposes of this suit.

* * * * * * *

8th. That the subscription was voted upon, under proper notices, and was carried by almost a unanimous vote of the town, the vote being largely in excess of the requisite constitutional and legislative majority.

9th. That at the date of this subscription, Dyersburg was without railroad facilities, and the object of the subscription was to get the railroad; that the railroad has

been built, and no part of the subscription has been paid, except the first installment of interest was paid.

See Agreement of Counsel, pp. 3 and 4.

See Finding of Facts by the Court, record pp. 11 and 12.

It will thus be seen that the whole question for consideration by this court is one of law, and that question is, whether defendant had legislative authority to execute the bonds sued on, or required any such legislative authority; or whether, under the facts of the case, it is not liable on the bonds as non-negotiable securities, the court treating the bonds as mere evidences of the subscription, and the town's liability therefor, subject to all defenses or equities, and in so far as they purport to be negotiable, as in excess of the power possessed by the defendant.

This record shows that this subscription was voted twice; the last time, 126 to 2.

See record, 7.

And it shows that the railroad has been in operation fourteen years, and defendant has reaped and retains all the benefits it contracted for; and although the subscription only lacked 2 out of 128 of being unanimously carried, this record shows that it has been unanimously repudiated, and this in the face of the fact that plaintiff bought the bonds in good faith, for full value, before due; and defendant only attempts to repudiate upon the ground, *not that it did not have the power to make the subscription; not that it has been cheated or defrauded, and did not get what it contracted for, but upon the legal technicality that the evidence of the subscription and purchase of the stock was taken in a form not authorized by law.*

LAW OF THE CASE.

We respectfully submit that this defense presents no features that address themselves to the conscience of this court. Here all the considerations contracted for and contemplated in the subscription have been received by the defendant, and no equity or failure of consideration is averred or shown. In fact, it is a clear repudiation of a solemn contract, after the party has gotten all the benefits thereof, and has, in the most solemn manner, given assurances of its willingness to pay the consideration agreed to be paid.

"Under these circumstances, where a suit is brought on "them by a *bona fide* holder for full value, as found by the "circuit court to be the case here, some substantial defense "must be set up by the county before it can escape lia- "bility."

Opinion of Mr. Justice Wood, in County of Clay v. Society for Savings, 104 U. S., p. 579.

This has been the enunciation of this court in almost every case where technical objections have been interposed against innocent purchasers, and the court has uniformly held that where the power to subscribe for stock upon certain conditions precedent existed, it would not go behind the recitation of the bonds to look to see whether the election was held, or other conditions complied with.

In Talcott v. Pine Grove, 19 Wallace, Mr. Justice Swayne, on page 678, quotes approvingly from Sedgwick on Statutory and Constitutional Law, as follows:

"It must be further borne in mind, that the invalidity of "a contract made in violation of statutes, is subject to the

"equitable exception, that although a corporation in "making a contract, acts in disagreement with its charter, "where it is a simple question of capacity or authority to "contract, arising either on a question of regularity of "organization, or of a power conferred by the charter, "*a party who has had the benefits of the agreement cannot be* "*permitted, in an action founded on it, to question its validity.* "It would be in the highest degree inequitable and unjust "to permit the defendant to repudiate a contract, the fruit "of which he retains. And the principle of this exception "has been extended to other cases. So a person who has "borrowed money of a savings institution upon his promis- "sory note secured by pledge of bank stock, is not entitled "to an injunction to prevent the prosecution of the note "upon the ground that the savings bank was prohibited "by its charter from making loans of that description."

We simply refer to these elementary and well-established principles, and now proceed to discuss the propositions as to which error is assigned:

PROPOSITION FIRST.

It will be noticed that the declaration does not aver these bonds were issued under any particular act, nor do the bonds recite any particular act as authority for their issuance; the declaration sues for the bonds "executed and issued "by said corporation on the 10th day of May, 1873, upon "and in pursuance of lawful authority conferred for that "purpose on said corporation."

And the bond simply recites that it is issued "under the provision of an act of the Legislature empowering them to do so."

Therefore we can look to all the legislation on the subject, and if there be any, authorizing the same, the bonds must be supported.

It will be observed that paragraph 29, Art. II, of the Constitution of 1870 is identical with that of 1834, being *verbatim* down to the point of lending corporate aid, the only difference being that the Constitution of 1870 has an *addenda*, not in the Constitution of 1834, which itself restricts and limits the power of municipal corporations in lending aid and credit, and provides that it can only be done upon the votes of three-fourths of the qualified voters cast at the election, to determine the question, while the Constitution of 1834 authorizes it to be done as the Legislature may from time to time direct.

However, under both Constitutions, it has been held that subscriptions in aid of railroads was a corporate purpose, and counties and towns had the right to lend aid and credit, and levy taxes to pay the same.

Nichol v. Nashville, 9 Humphreys 250–252.
L. & N. R. R. Co. v. Davidson County, 1 Sneed 666.
City of Memphis v. Gayoso Gas Co., 9 Heiskell 537.
Winston v. Tenn. & Pacific R. R. Co., 1 Baxter 66.
And other cases.

We insist that there was express legislative authority for the issuance of these bonds, and that they were executed in strict conformity therewith, and will now proceed to show such authority.

The act of Tennessee, passed January 16, 1871, chapter 50, Acts of 1870–71, is entitled "an act to enforce Article II, "paragraph 29, of the Constitution, to authorize the several

"counties and incorporated towns in this State to impose "taxes for county and corporation purposes." And by the second paragraph of section 1 it is provided that "the credit of no county, city or town shall be given, "loaned to or in aid of any person, company, association or "corporation, except first upon the consent of a majority "of the justices of the peace of the county at the quarterly "term of the county court of said county, or a majority of "board of mayor and aldermen, as the case may be, of the "such city or town, and upon an election afterwards held by "the qualified voters of said county, city or town, and the "assent of three-fourths of the votes cast at the said elec- "tion. The said county court or board of mayor and "aldermen, as the case may be, shall spread upon their "records the proposition, and the amount to be voted upon "by the people, and shall have full power to hold and con- "duct such elections according to the laws regulating elec- "tions in this State; and if the assent of three-fourths of the "voters of such county, city or town is had, then the county "court or board of mayor and aldermen, as the case may "be, shall have full power to make and execute all necessary "orders, *bonds*, and payments in order to carry out such loan "or credit, voted for as prescribed in this act."

See this Act, Exhibit No. 2 hereto.

It will be observed that this act *expressly purports, in its title, to launch out and put into operation this constitutional provision in regard* to corporate aid; there had been no other general act passed up to the date of the issuance of these bonds, and this act alone purports to give effect to, and put into practical operation this provision in regard to corporate aid.

Now let us analyze and examine its provisions: It provides that no corporate *credit* shall be given, loaned to, or in aid of any company, association, or corporation, unless:

1. It must be consented to by a majority of the justices of the peace of the county, or of the board of mayor and aldermen of the town or city.

2. There must be then a lawful election, and three-fourths of the votes cast must be for the subscription. The statute then reads: If the assent of three-fourths of the voters of such county, city or town, is had, then the county court or board of mayor and aldermen, as the case may be, shall have "*full power to make and execute all necessary* "*orders, bonds and payments, in order to carry out such loan* "*or credit voted for, as prescribed in this act.*"

The language used is, *that the credit* of no county, city or town shall be given, loaned to, or in aid of any company &c. How could the credit be loaned any corporation except in some negotiable shape? The word *credit* is used; it does not use the word *cash, but credit.* The word credit is also used in the constitution of 1870, paragraph 29, Article II. "But the credit of no town, city or county shall be given, loaned to, or in aid of, &c.," being in the exact language of the act relied upon. We must read this act, stripped of all verbiage and technicality, as follows: The credit of any county or town may be given or loaned to any company, if three-fourths of the votes cast elect so to do; that the proposition for such credit or loan shall be spread on the records of such town or county, and if it receives the three-fourths vote, the county court or board of mayor or aldermen shall have full power to execute all necessary orders, (*to evidence and perfect the subscription*) *bonds* (*to evidence and*

make effective the loan of credit voted) and payments (*to discharge the same*) in order to carry out such loan or credit. The act expressly provided that all *necessary bonds* may be executed, *full power* to execute all necessary bonds * * in order to carry out such loan or credit. Nor was equivocal language used, but it reads: "*Full power to execute all necessary* * * * * *bonds* * * * * to carry out such loan or credit." If the framers of the Constitution and act above relied upon, had intended only to allow money to be loaned for such purposes, how easy would it have been to have so framed the law? They, however, provide for the loaning of *credit*, and say the corporate authorities have *full power* to execute all *necessary bonds* to make effective the loan or credit authorized.

It will be further noticed that the words loan or credit are both used. If money was loaned, then orders and payments to carry it into effect were authorized. *If credit was loaned, then full power to execute all necessary bonds to represent such credit.*

Exhibit No. 11, hereto, shows that municipal aid, under both the Constitutions of 1834 and 1870, had always been extended to such enterprises by means of negotiable securities.

The foregoing was the interpretation put upon this act by this railroad company and the town of Dyersburg, when this subscription was being canvassed, and carried out, for they followed the same to the letter. The proposition was first submitted to the Mayor and Aldermen, and they voted for it unanimously. It was then submitted to a vote of the people upon due notice; the notice calling for an election for the subscription of the identical fifty thousand

dollars of bonds that were issued, and the election held on the 12th of September, 1871, resulted in favor of the subscription by a legal majority. Afterwards another election was had for the subscription of these same bonds now sued on, of which legal notice was given, and at this election there were 126 ayes to two nays. The result of the election was canvassed and announced by the Board of Mayor and Aldermen as above, and put to record, and the Mayor and Recorder ordered to perfect the subscription, and execute and deliver the bonds, the railroad company accepting the subscription as made.

See record pages 5–6–7–8.

The two acts under which these bonds were issued, are herewith filed as Exhibits 2 and 3 hereto, and the Constitution of 1870, on this point, is made Exhibit No. 1 to this Brief.

Another objection that was urged to these bonds by the court below, was, that the bonds as issued were 7% bonds, when the general interest laws of the State prescribed 6% as the interest rate. This objection is untenable, for the act of 1869–1870, chap. 69, expressly provides, that "hereafter it shall be lawful to contract for any rate of interest "not exceeding 10 per cent. per annum, provided that the "rate of interest be in writing and expressed in the face of "the instrument creating the debt or obligation."

This act was in force when these bonds were executed, and was only repealed by the act of 1877, chapter 21. For both of these acts, see Exhibits 5 and 6 hereto.

Since the passage of this act, the Supreme Court of Tennessee has had before it two cases arising subsequent to

1871, in one of which this statute is considered; but in that case, M. & A. of Pulaski v. Gilmore *et als.*, MS., Nashville, 1880, Judge Freeman, delivering the opinion of the court, while adjudging the bonds in question void for want of power in the town to issue bonds of the particular class or character, amount, interest, maturity, etc., that were then involved, yet says: "What was intended by the reference to execution of all necessary orders, bonds and payments in order to carry out a loan or credit we need not now determine." The bonds involved in that case were eight per cent. twenty-year bonds, the general interest law of the State allowing six per cent. interest.

This opinion of Judge Freeman has never been reported, but a copy thereof is printed in Exhibit No. 10 hereto.

The other case in Tennessee since 1871 is that of Milan v. R. R. Co., reported in 11 Lea 329.

Here, however, no reference is made to this act of 1871, and the reference thereto by counsel for defendant is to no purpose. The authority for that issue of its bonds was sought to be found in the charter of the Tennessee Central R. R. Company, and no reference is made in the decision to any other authority for that issue.

In fact the court in that case nowhere refers to the act of 1871, ch. 50; nor is the same cited or relied upon or any mention made thereof therein.

It is manifest, therefore, that the plain reading of the act of 1870–71, ch. 50 (launching and putting into operation as it does this paragraph 29, Art. II of the new Constitution of 1870, under which corporate aid alone could be granted), clearly authorizes the issuance of bonds such

as were issued in this case. The proposition to vote these particular seven per cent. bonds was put into an ordinance and voted twice, the last time by an almost unanimous vote, and we say no court would be justified in destroying bonds in a case like the present, where the language employed in its natural and common meaning justified their issuance, and where all the benefits contracted for have been received and retained, and the bonds are in the hands of an innocent purchaser for value—when to destroy them the court must put a strained and unnatural interpretation on the language used, which in itself is plain and unambiguous. Suppose one of your Honors in 1873 had been called upon to pass upon the authority of the defendant to issue these bonds, and you had examined the Constitution of 1870, Article II, par. 29, the Acts of 1870–71, ch. 50, and the act of 1871, ch. 22, and had then gone and found the ordinance passed by the Board of Mayor and Aldermen spread on the minutes providing for the issuance of $50,000 of seven per cent. bonds, and then a proper election, and that the election had been almost unanimous, and the bonds issued, would you have said or not that the bonds were valid? Was there anything evidencing a want of authority? The constitutional and legislative guarantees had been carefully observed and the people knew exactly that they were voting on $50,000 of seven per cent. bonds, and the consideration was to be a railroad through their county and a depot within half a mile of their court house. Nothing could more clearly be shown to be within the authority delegated than the issue of these bonds.

Again, these bonds can be supported under the Acts of 1869–1870 and Acts of 1868–1869, ch. 59 (Exhibits Nos. 7 and 8 to this brief), which authorize the subscription to

be paid in four and six years, and negotiable bonds issued therefor.

The objection that ten-year bonds instead of six-year bonds were issued cannot be relied upon to defeat the same.

This was the same objection that was urged in the case of L. & N. R. R. Co. v. County Court, 1 Sneed, at page 683. There the court says: "That stock is made payable in five "installments in the order, and the act contemplates but "three.

"This objection would seem to be made under a mistake "as to the provisions of the act. In the 8th section it is "provided that not more than one-third of the stock voted "and subscribed shall be required in any one year.

"It nowhere prohibits more installments and a less "amount.

"This is the more favorable to the taxpayers, and cannot "be an available objection.

"If it were a departure from the act, it would not lie in "the mouth of the party benefited by it to complain, and "more particularly when it was fixed by the vote of that "party as a term of the contract."

Again: In Ross v. Anderson Co., MS. opinion, Knoxville, Tenn., September term, 1874 (a copy of which is hereby appended as Exhibit No. 9), the Legislature authorized a subscription of bonds payable in thirty years, and the submission to the people was for a subscription payable in six installments. They voted on the submission, and, instead of bonds payable in six years, bonds payable in thirty years were issued; and the court held that the bonds were valid and binding against the protest and objection of taxpayers.

We do not see why this case is not decisive of the one under consideration, and a full answer to the objection urged.

We further insist that, upon questions of commercial securities, Federal Courts are not bound by State decisions.

Oates v. National Bank, 10 Otto 246, and cases cited.

Pine Grove v. Talcott, 19 Wallace 677.

Under the facts and authorities above stated, we might, with propriety, rest our case here, but we submit the other two propositions as being equally conclusive.

PROPOSITION SECOND.

This presents the simple question, whether the defendant, having the power to make the subscription and lend the credit, had the implied power and authority to execute and deliver bonds negotiable in form, independent of any express authority conferred.

Mr. Daniel, in his treatise on the power of municipal corporations to issue negotiable securities, lays down the principles governing the same, as follows:

"Sec. 1527. The powers of corporations have been "divided judiciously into three classes: 1. Those granted "in express words. 2. Those necessarily implied or neces- "sarily incident to the powers expressly granted. 3. Those "absolutely essential to the declared purposes and objects "of the corporation—not simply convenient, but indis- "pensable.

"Whatever power is implied is as effectual as that which "is expressed; and in the United States the following "propositions are sustained by weight of authority:

"1. That whenever a municipal corporation has power "conferred to contract a debt, borrow money, or issue "negotiable security, it is to be regarded, *quo ad hoc*, as a "private corporation.

"2. That a municipal corporation has implied power "to contract a debt whenever necessary to carry out any "power conferred upon it.

"3. That whenever it may contract a debt it may bor- "row money to pay it.

"4. That whenever it may contract a debt or borrow "money it may issue its negotiable bonds for its payment."

In sections 1528, 1529, 1530, he discusses the first three of the foregoing principles, and in section 1531, he says: "As to the fourth proposition, when the power to borrow "money is clear, it necessarily involves in its exercise the "execution of a security for its repayment; and negotiable, "coupon bonds being the common and most acceptable "form of municipal securities, when given for money "legitimately borrowed, would undoubtedly be valid, as "has been stated.

"And it has been generally considered that when the "municipality has authority to contract a debt, it has the "power to evidence the same by a bill, note, bond or other "instrument."

Authority to subscribe stock in a railroad "as fully as an individual" given to a city, was implied authority to take stock on a credit and issue negotiable bonds in payment.

Seibert v. Pittsburg, 1 Wallace 272–4.
Commonwealth v. Pittsburg, 41 Pa. St. 278.

Authority "to borrow money for any object in its discretion" construed as authority to borrow money and issue negotiable bonds to pay for it.

Meyer v. Muscatine, 1 Wallace 387.

In Morawetz on Corporations, Vol. 2, sec. 350, that author says:

"In the United States it has been held, in accordance with the general rule governing the construction of charters, that corporations have implied authority to execute negotiable promissory notes whenever the use of commercial paper is appropriate as a means of accomplishing their charter purposes."

Willard, J., said in delivering the opinion of the Court of Appeals of New York: "No question is better settled upon authority than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day or on demand, when such note is given for any of the legitimate purposes for which the company was incorporated."

In case of Police Jury v. Britton, 15 Wallace, at page 572, Bradley, J., in speaking of implied power to issue bonds, says: "We do not mean to be understood that it requires in all cases express authority for such bodies to issue negotiable paper. The power has been frequently implied from other express powers granted.

"Thus it has been held that the power to borrow money implies the power to issue the ordinary securities for its payment, whether in the form of notes, or bonds payable

in the future. So the power to subscribe for stock in a railroad, or to purchase property for a market house, and other like powers, which cannot be carried into execution without borrowing money or giving *obligations*, payable in the future, have been sufficient to raise the implied power to issue such obligation."

All the authorities agree that where a municipal corporation has the implied power to borrow money or lend credit, it has the implied power to execute all proper bonds, notes or other negotiable securities to accomplish these purposes.

Hulls v. Argus, 12 Iowa 142.
Gause v. City of Clarksville, 5 Dillon C. C. 167–8.
Wills v. Gleason, 11 Wisconsin 470.
Bank v. Chillicothe, 7 Ohio (Pt. 2) 31.
Commissioner v. Pittsburg, 34 Penn. St. 496.
Griffin v. Inman, Swann & Co., 57 Ga. 370.
Black v. Cohen, 52 Ga. 623.
Ketchum v. Buffalo, 14 N. Y.

In this last case the court, after holding that the city of Buffalo had the implied authority to issue the bonds, uses the following language:

"If then the city of Buffalo had power under its charter to purchase the ground for a market, it had authority, so far as its charter is concerned, to do so upon a credit, to which there was no limit but its discretion, and the right to give the single bill in question would follow as a necessary consequence.

"*Power to contract a debt must carry with it power to give a suitable* acknowledgment of the indebtedness, in the form, either of a promissory note or a single bill. I can conceive

no well-grounded rule which would concede one of these powers and deny the other, and no such distinction is warranted by the cases."

This implied power is thoroughly indoctrinated into the laws and decisions of the State of Tennessee, as will be seen by reference to the cases.

On this point, see

Union Bank v. Jacobs, 6 Humph. 515.
Nichol v. Mayor of Nashville, 9 Hum. 264.
Adams v. M. & L. R. R. R. Co., 2 Coldwell 645.
Moss v. Harpeth Academy, 7 Heisk. 288.
Ross v. Anderson Co., MS., Knoxville, Tenn., Supreme Court, 1874, Exhibit No. 9.

In Union Bank v. Jacobs, 6 Humphreys 515, the Hiwassee Railroad Company had in its construction, issued its notes to a contractor, and these notes were resisted on the ground that the R. R. Co. had no express power to do so, but all payments should be made from the capital stock alone. Turley, J., on page 524, delivering the opinion of the court, says: "It is argued that the capital stock of the company is the only means provided for the payment; and that no other can be resorted to for that purpose; or, in other words, that it must pay cash for every contract, for that no power is given by which it may contract upon time; for if it may create a debt, of necessary consequence it may create written evidences of that debt, and these may be either promissory notes or bills of exchange. * * * *

"A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes,

resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter or some public law from so doing.

"There is no principle which prevents a corporation from contracting debts within the scope of its charter; and, as has been observed, if it may contract a debt, it necessarily may make provision for its payment by drawing or endorsing or accepting notes and bills."

It will be argued that the railroad company in the 6 Humphreys case, was a private corporation, and therefore, the principle has no application. In the 9 Humphreys and 2 Cold. cases now referred to, they were municipal corporations, and the same principle is held applicable.

In Nichol v. Mayor of Nashville, 9 Humphreys 250, a tax-payer sought to enjoin and stop a subscription by Nashville to the Nashville and Chattanooga Railroad Company on the ground that the city had no authority to do so, it being no corporate purpose, and if it had, it had no authority to issue bonds. In commenting on this case, there were two acts relied on to sustain the bonds, one of 1845 simply authorizing the subscription, and the act of 1847 which authorized bonds to be issued to pay the same. The court in passing on the act of 1845, which we insist contained the implied authority, on pages 264–5, says:

"The act of 1845 merely authorized the corporation to take stock in the railroad without giving it any power to raise money for its payment. We think there is nothing unconstitutional in this, * * * and why may not the Legislature enlarge its powers to enable it to do this, if, by strict construction it be held not to have such power without it?

"In our judgment it may, *and under this statute we would be constrained to hold that the corporate authorities of the town of Nashville had the power to subscribe the stock in the railroad and to execute its notes for the payment thereof; as the power to contract necessarily implies the power to execute the commercial evidences thereof.*

Union Bank v. Jacobs, 6 Hump.

"And upon a bill to enjoin the corporation from subscribing for such stock and executing its notes for the payment, we could not and would not inquire whether the corporation had the money to take up these notes, or whether, when they fell due, the amount would have to be raised by taxation or borrowing."

It will be observed that the court in this case holds that where a municipal corporation has the power to subscribe for stock in a railroad, that it has the *implied* "power to *execute the commercial evidences thereof*," independent of express legislative authority.

In Adams v. M. & L. R. R. R. Co., 2 Cold. 445, the city of Memphis, in order to insure the building of the Memphis & Little Rock Railroad, made a mortgage on the Navy Yard property to secure $300,000 of bonds, and the whole question turned upon the power of the city to make the transaction and mortgage of its property, there being no separate special legislation authorizing it. On page 653, the court, in passing on the authority of the city, says:

"Under the foregoing facts the bill was filed, and the question upon which the case principally turns involves the power of the corporation of the city of Memphis. Had the Mayor and Aldermen, as the representatives of the corporation, the power under the acts of incorporation

to dispose of this property in the manner and for the purposes set forth in the mortgage? By the 3d section of the charter of the corporation of the Mayor and Aldermen of the city of Memphis, it is declared that they may by their corporate name 'sue and be sued in all the courts 'of law and equity—may purchase, receive and hold property, real, personal or mixed, within the city, for all needful purposes of city, and may alien, sell or dispose of the 'same for the use and benefit of the city, and may purchase, 'receive or hold property, real, personal or mixed, beyond 'the limits of the city, to be used for the burial of the 'dead, for the erection of water works to supply the city 'with water, for the obtaining of gravel, sand or other 'materials to improve the streets, alleys and avenues of the 'city and for other purposes—for the establishment of 'work house, poor house, houses of correction, magazines, 'hospitals and infirmaries, and may sell, lease or dispose of 'the same for the use and benefit of the city, and may do 'and perform all other acts as natural persons.'

"The powers of municipal corporations as a familiar principle are limited to the grants in the charter, and such as are necessarily implied. The power 'to hold real, personal or mixed property,' and to 'sell, lease or dispose of the same for the use and benefit of the city,' by necessary implication under the enlightened jurisprudence of modern times, comprehends the power to exercise such other powers not expressly granted or forbidden by the terms of the charter or the general laws which are necessary to develop the growth and prosperity of the city.

"Were it not so, no growing town or city could conform its local administration to the shifting and increasing wants of its population. The municipal government would

be constantly crippled in its action by the restraints of a refined and technical construction of its powers.

"A corporation is, in the estimation of the law, a body created for special purposes, and *there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing.*

"Union Bank v. Jacobs, 6 Hump. 515, 525.
Mayor and Aldermen of Memphis v. Wright, 6 Yerger 497."

The court will observe that in speaking of the powers of a municipal corporation in the above case, the court says *no good reason exists why, if not prohibited, it should not act in these matters as an individual.*

In Ross v. Anderson Co., MS. (Exhibit 9), Sneed, J., says: "We take it to be a sound principle, however, that "a county, like another corporation, having the right to "make the subscription, can issue the commercial evi- "dences of it in such form as may be satisfactory to the "parties."

This had been the uniform and unbroken line of authority in Tennessee up to the date of the issuance of these bonds, our courts having never made any distinction in the implied powers of private and municipal corporations; and this court has uniformly followed the ruling of the Supreme Court of the United States in the construction of the powers exercised and authorized to be exercised by them.

Seibert v. Pittsburg, 1 Wallace 272-4.

The town of Dyersburg, in addition to the constitutional and legislative authority above relied on to lend such credit, had power "to purchase and hold property, real, personal and mixed, and dispose of the same for the benefit of said town. * * * To lay and collect taxes for the purpose of carrying all necessary measures in operation for the benefit and advancement of said town, and to pass all laws necessary and proper to carry the intent and meaning of this act into effect" (see Exhibit No. 12), being almost the identical powers construed in the 2nd Coldwell and 9 Humphreys cases.

PROPOSITION THIRD.

That in any event this court should hold the defendant as upon non-negotiable bonds or notes, treating the issuance of negotiable bonds as an excess of authority only, and not invalidating the loan with interest as agreed upon.

In Ray v. Nashville, 19 Wallace, this court expressly holds that "Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditor." (See bottom of page 475.)

* * * * * * *

And on page 477, "Vouchers for money due, certificates "of indebtedness for services rendered, or for property fur- "nished for the uses of the city, orders or drafts drawn by "one city officer on another, or any other device of the "kind used for liquidating the amounts legitimately due "to public creditors, are of course necessary instruments "for carrying on the machinery of municipal administra- "tion, and for anticipating the collection of taxes."

* * * * * * *

And on page 478, "But where the power has not been "given, parties must take municipal orders, drafts, certifi- "cates and other documents of this sort at their peril. "Custom and usage may have so far assimilated them to "regular commercial paper, as to make them negotiable, "that is, transferable by delivery or indorsement.

"This quality renders them more convenient for the pur- "pose of the holder, and has undoubtedly led to the idea "so frequently, but, as we think, erroneously, entertained, "that they are invested with that other characteristic of "commercial paper—freedom from all legal and equitable "defenses in the hands of a *bona fide* holder. But every "holder of a city order or certificate knows that, to be "valid and genuine at all, it must have been issued as a "voucher for city indebtedness. It could not be lawfully "issued for any purpose. He must take it, therefore, subject "to the risk that it has been lawfully and properly issued. "His claim to be a *bona fide* holder will always be subject "to this qualification."

We respectfully insist that the foregoing principles as announced conclude this case. It has been held in Tennessee, since the 9th Humphreys case, that granting municipal aid to railroad companies was for a legitimate corporate purpose, and the great effort of the court has been in the past to protect municipalities whose paper has been fraudulently issued and sold, and where no consideration has been received, against the enforcement of the bonds. But here every consideration tends the other way. The people are attempting to repudiate what they expressly

authorized, and where they have received the full consideration.

The agreement as to facts and findings of the court all show that all conditions and considerations for this subscription have been faithfully complied with, and that they voted a subscription, payable in ten years, with interest at 7 per cent. Treating the bonds as the mere evidence of this liability, as defined in this 19 Wallace case, we insist that fair dealing and all other considerations demand the reversal of judgment of the court below, and enforcement of the liability of the town of Dyersburg for payment of these bonds.

D. H. POSTON,
W. K. POSTON,
PARKS & DRAPER, AND
SMITH & COLLIER,
For Plaintiff in Error.

Since printing this Brief we have had our attention called to Williams v. R. R. Co., 9 Baxter (Tenn.) 488, decided in 1876, which seems to be decisive of the case under consideration. *There, taxpayers of Marshall county enjoined the collection of a tax levied to pay interest on the bonds issued to the railroad.* The railroad was chartered by the chancery court in 1871 or 1872, and the regularity of its incorporation is one of the main points argued. After its organization it asked the county court of Marshall county for a subscription of $115,000, and submitted the question to a vote of the people (necessarily under the general laws passed since the Constitution of 1870, as no specific act is referred to as authorizing the same), who voted the amount of the stock, and the bonds of the county were issued, and a large portion of them were used and expended in the construction of the road.

The court then passes upon the validity and regularity of the charter and holds it substantially valid, and on the question of the subscription says: " Without reviewing in detail the proceedings incident to the subscription of stock by the county, we are of opinion that no such irregularities occurred in the proceedings to that end as to invalidate the subscription " and dismiss the bill.

There the subscription was paid in bonds without express legislative authority, and it was sustained.

If the Acts of 1870–71, Chapter 50, did not expressly authorize bonds, *implied authority was necessarily conceded in order to sustain the issue of bonds in this 9th Baxter case.*

Exhibit No. 1.

CONSTITUTION, 1870.—ARTICLE II.

SECTION 29. The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election.

Nor shall any county, city or town become a stockholder, with others, in any company, association or corporation, except upon a like election and assent of a like majority. But the counties of Grainger, Hawkins, Hancock, Union, Campbell, Scott, Morgan, Grundy, Sumner, Smith, Jenkes, Van Buren, White, Putnam, Overton, Jackson, Cumberland, Anderson, Wayne, Marshall, Cocke, Mason, and the new county herein authorized to be established out of the fractions of Sumner, Macon and Smith counties, and Roane, shall be excepted out of the provisions of this section, so far that the assent of a majority of the qualified voters of either of said counties, voting on the question,

shall be sufficient, when the credit of such county is given, or loaned, to any person, association or corporation.

Provided, That the exception of the above named counties shall not be in force beyond the year one thousand, eight hundred and eighty, and after that period they shall be subject to the three-fourths majority applicable to the other counties of the State.

Exhibit No. 2.

ACTS OF 1870–1871.—CHAPTER 50.

AN ACT to enforce Article II, section 29, of the Constitution, to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee:* That the several counties and incorporated towns in this State may and are hereby authorized to impose taxes for county and corporate purposes, respectively, in the following manner and upon the following conditions:

1st. That all taxable property shall be taxed according to its value, upon the principles established in regard to State taxation.

2d. The credit of no county, city or town shall be given, loaned to or in aid of any person, company, association or corporation, except first upon the consent of a majority of the Justices of the Peace of the county at the quarterly term of the County Court of said county, or a majority of Board of Mayor and Aldermen, as the case may be, of the such city or town, and upon an election afterwards held by the qualified voters of said county, city or town, and the assent of three-fourths of the votes cast at the said election. The said County Court or Board of Mayor and Aldermen, as the case may be, shall spread upon their records the proposition, and the amount to be voted upon by the people, and shall have full power to hold and conduct such elections according to the laws regulating elec-

tions in this State; and if the assent of three-fourths of the voters of such county, city or town is had, then the County Court or Board of Mayor and Aldermen, as the case may be, shall have full power to make and execute all necessary orders, *bonds*, and payments in order to carry out such loan or credit, voted for as prescribed in this Act; nor shall any county, city or town become a stockholder, with others, in any company, association or corporation, except upon a like election and the assent of a like majority, as prescribed in this Act.

Section 2 provides that certain counties may vote such aid, and upon a simple majority, doing away with the three-fourths of all the votes cast.

SEC. 3. *Be it further enacted*, That the taxes imposed by this Act, voted by any county, city or town, shall not be greater than the taxes on property and polls. And as the public welfare requires it, this act shall take effect from and after its passage.

Passed January 16th, 1871.

This Act is carried into Milliken & Vertrees' Code of 1884, at Section 1287, and is substantially in the language and verbiage of paragraph 29, Article II, of the Constitution of 1870.

Exhibit No. 3.

ACT OF 1871.—CHAPTER 122.—(Page 133.)

AN ACT to legalize and authorize subscription by incorporated cities and towns for the benefit of railroads created by law.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee:* That where any incorporated town or city in this State has, previous to the passage of this Act, subscribed to the capital stock of any railroad company created by the laws of this State, and said subscription has been ratified by three-fourths of the qualified voters of said town or city, in accordance with the provisions of the Constitution, said subscription shall be deemed a valid and legal subscription, notwithstanding the same may be in excess of the amount provided for in Section 1142 of the Code. *Provided*, That should any doubt exist as to the effect of this Act in legalizing such subscription, any such city or town is hereby authorized and empowered to revote the same, or any other amount, and the same, when voted or subscribed, shall be held to be legal and valid, and said Section 1142 of the Code, and all other laws or parts of laws in conflict therewith, so far as affects the legality of any subscription thus made under the provisions of this Act, be and the same are hereby repealed, but in every other regard to remain in full force and effect.

SEC. 2. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed December 14, 1871. Approved December 16, 1871.

Exhibit No. 4.

ACTS OF 1871.—CHAPTER 129.—(Page 142).

AN ACT to amend section 1142 of the Code and repeal the third section of an act passed January 16, 1871.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That so much of section 1142 of the Code as prohibits any county, incorporated town or city from subscribing stock in railroads running to or contiguous thereto, to an amount exceeding in the aggregate one-fifteenth of its taxable property, be and the same is hereby repealed.

* * * * * * *

SEC. 4. *Be it further enacted*, That no county, city, town or incorporation shall subscribe in aid of any railroad or other corporation an amount in value exceeding one-tenth of its taxable property.

Passed December 11, 1871.

Approved by Governor December 15, 1871.

Exhibit No. 5.

ACTS OF 1869-1870.—CHAPTER 69.—(Page 86).

AN ACT to amend the Usury Laws of the State and to establish a conventional rate of interest.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That hereafter it shall be lawful to contract for any rate of interest not exceeding ten per cent. per annum, provided that the rate of interest be in writing and expressed in the face of the instrument creating the debt or obligation. And when judgment or decree shall be recovered on such written contract, it shall bear the same rate of interest as the written instrument upon which the judgment or decree is based, and shall be so expressed in the judgment or the decree and indorsed upon the execution issued thereon.

* * * * * * *

SEC. 5. *Be it further enacted*, That this act shall take effect from the first day of June, 1870.

Passed February 23, 1870.

Exhibit No. 6.

ACTS OF 1877.—CHAPTER 21.—(Page 35.)

AN ACT to repeal an act entitled "An Act to amend the Usury Laws of the State and to establish a conventional rate of interest," and prevent the use of money at a greater rate of interest than six per cent. per annum.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That an act passed February 23, 1870, entitled "An Act to amend the usury laws of the State and to establish a conventional rate of interest be and the same is hereby repealed.

SEC. 2. *Be it further enacted*, That this act take effect from and after its passage, the public welfare requiring it.

Passed March 20, 1877.

Approved March 20, 1877.

Exhibit No. 7.

ACTS OF 1868-9.—CHAPTER 59.—(Page 311).

SECTION 20. *Be it further enacted*, That it shall be lawful for the town of Dyersburg to make a corporate subscription to the capital stock of the Mississippi River Railroad Company, not to exceed Fifty Thousand Dollars in amount, payable in not exceeding four years by annual assessments levied by the Board of Trustees of said town, and collected as other moneys due, and bonds of the town may be issued in anticipation of such collections collected for town purposes. Provided, however, that before the Board of Trustees or Aldermen of said town shall make any such subscription the question shall have been first submitted to the qualified voters of said town, and shall have received a majority of the votes cast therefor after twenty days' notice of the time and place of holding said election, and of the amount proposed to be subscribed.

* * * * * * *

SEC. 36. *Be it further enacted*, That * * * this act take effect from and after its passage.

F. S. RICHARDS,
Speaker of the House of Representatives.

P. P. C. NELSON,
Speaker of the Senate.

Passed February 26, 1869.

Exhibit No. 8.

ACTS OF 1869–1870.—(Page 362).

Relative to Mississippi River Railroad provides, amongst other things, as follows:

* * * * * * *

SECTION 18. *Be it further enacted*, That stock which has been subscribed, or may hereafter be subscribed, by any county, city or incorporation to said railroad companies may be payable in six annual payments, and it shall be lawful for county courts and the corporate authorities of any city or town making such subscription to issue short bonds bearing interest at the rate of six per cent. per annum to said railroad companies, in anticipation of the collection of annual levies, if thereby the construction of the railroad can be facilitated.

* * * * * * *

Passed February 8, 1770.

Exhibit No. 9.

THE STATE, EX REL. ROSS, v. ANDERSON COUNTY. } Opinion.

This is a petition for a *mandamus* from the Circuit Court of Anderson county, filed by the relator against the county court of said county, to enforce a levy of taxes for the payment of certain interest coupons issued by the county in January, 1856, and within three successive years thereafter, with certain county bonds, in discharge of the county subscription of stock in the Knoxville and Kentucky Railroad Company. A fiat was obtained for an alternative writ of *mandamus* from one of the circuit judges of this State on the 31st of December, 1873, and the petition filed on the 5th of January, 1874. An amended petition was by leave of the court filed at the June term, 1874, of the circuit court of said county. The petition states, in substance, that the county of Anderson, on account of said subscription, issued about one hundred thousand dollars of its bonds about January, 1856, and within three years thereafter, in sums of five hundred dollars and one thousand dollars each, payable thirty years from date, with coupons or interest warrants attached for the payment of interest semi-annually, at the rate of six per cent. per annum. That the relator is the owner and bona fide holder for value of seven of said bonds, amounting to $6000, and that fourteen of the interest coupons were due at the time of filing the petition, and fourteen would fall due on the 1st

January, 1874. That he had made demand of payment of the county trustee, and of the justices composing the said county court. That the said trustee refused to pay, stating that he had been so ordered by the court; and that the said justices had replied that said coupons would not be paid. That said bonds and coupons are made payable to the Knoxville and Kentucky Railroad Company, or bearer, and were issued by authority of law, as they purport on their face, and that there were statutes which authorized their issuance, and made them all obligatory on the county. The bonds and coupons are set forth and described by dates, numbers and amounts, and it is stated that the petitioner is the bona fide holder for value of all said coupons as described.

The petition contains this averment: "That said bonds or warrants have been recognized by the county court of said county as a valid debt against said county, from the time they were issued, until a short time previous to the commencement of this suit; and that the county has paid all the interest due upon said bonds up to the 1st of July, 1872, including the interest due at that date. The county court has levied and collected taxes for the payment of said coupons or interest warrants, and the citizens of said county have paid said taxes for that purpose, and neither the county court, nor any citizen of said county, prosecuted to a successful termination any suit in law or equity, to prevent the issuance of said bonds, nor to prevent their negotiation by the Knoxville & Kentucky Railroad Company; and there never was any proceeding instituted, either by the county or any citizen thereof, to have said bonds or coupons declared void, nor to prevent their issuance or negotiation, but the same have been treated by the

county court and the citizens of said county as a valid debt against said county, from the time they were issued, until after the 1st of July, 1872, and said county has paid the relator all the interest that has accrued on the bonds mentioned in his petition, ever since he has received said bonds, except the coupons or interest warrants mentioned in said petition." Upon the hearing of the cause by the circuit court the peremptory mandamus was refused and the petition dismissed. The relator has appealed.

There are several minor objections taken to the proceedings by the defendant upon argument in this court, which we do not feel called upon to discuss further than to observe that in our opinion they would interpose no legal barrier to the relief sought.

Upon the case made in the petition it is not necessary that the demand should have been merged into judgment, nor is it essential that the county trustee should be made a party. The justices of Anderson, constituting the county court of said county, are the proper parties defendant. Nor, in our judgment, does the fact that, at the time the fiat of the writ was obtained, some of the coupons were not due, interpose, under the facts, any serious ground for refusing the relief, even as to them, as it appears, on the face of the petition, that these coupons would fall due within a few days, and, as the Record discloses, they did actually mature before the petition itself was filed in court. In regard to several of the coupons, payable at the Bank of America, it is not fatal to the proceeding that the petition does not aver a presentment there, even if such presentment, in this kind of case, were essential, inasmuch as the petition does aver a sufficient excuse in the positive

and peremptory refusal of defendants to pay any portion of the coupons.

The main ground of defence presents questions of much public importance, and of more difficulty than the preliminary questions thus briefly disposed of. It is insisted, that the county of Anderson is not liable for these bonds and coupons, because they were issued without authority of law. It is certainly clear that the county had no right to contract this debt without legislative authority. But we may observe, at the threshold, that, after the solemn obligations of the county have been negotiated, and thrown upon the commerce of the country, into the hands of *bona fide* holders, who, so far from having any notice of any supposed illegality, were encouraged by the county itself, through a series of years, to give them implicit credit, it would require a very grave departure from legislative restrictions to justify the courts in exonerating the county. Indeed, the doctrine of ratification itself would be a legal panacea to all manner of mere irregularity, and must be fatal to the defence, unless it can be shown that the issuance of the bonds in question was, *ab initio*, void. By the act of 1852, ch. 117, the several counties of this State were authorized to subscribe for stock in any railroad enterprise located, or to be located, through said counties. This act initiated our system of railroad improvements, and is very liberal in its terms. It prescribed the mode of subscription, how the subscription was to be paid, and gave the circuit courts the power to enforce its provisions by the writ of mandamus against the county courts.

The act of 1852, ch. 191, authorized certain counties to subscribe stock in any chartered railroad located through

said counties, in any amount determined upon in the manner prescribed by law, and *to issue bonds* for the amount of stock so subscribed. The bonds to bear six per cent. interest—payable semi-annually, and to fall due in not less *than ten nor more than thirty years from date.* The act of the 18th February, 1854, ch. 180, applied the foregoing provisions expressly to the county of Anderson. The second section of said act provides that the acts of any of said counties in *voting stock in railroads*, and to issue county bonds for the same, not heretofore provided for by law, shall hereby be declared as valid and binding as though said acts had been strictly in accordance with law. The Knoxville and Kentucky Railroad Company was chartered in 1852, and was a railroad in which the county of Anderson might take stock under the act of 1852, ch. 117. But this act of 1852, ch. 117, did not authorize bonds to be issued. We take it to be a sound principle, however, that a county, like another corporation, may issue the commercial evidences of it, in such form as may be satisfactory to the parties. Under this act of 1852, ch. 117, the county court proceeded at the March term, 1853, to provide for a subscription of stock in said company, by ordering an election to ascertain the will of the people as the law prescribed; in which election the question to be voted upon was whether the county would subscribe one hundred thousand dollars of stock in said company, to be payable in six *annual instalments*, commencing in 1854. The act of 1852, chapter 117, provided that only $33\frac{1}{3}$ per cent. of the subscription of any county should be collected annually. The 12th section of said act provides that upon unexpected demand, when there is no railroad tax on hand, the county court may anticipate the collection of said

taxes by the issuance of county warrants, payable as desired by the board of directors, bearing interest at the rate of six per cent. per annum, &c., but the issuance of bonds was not expressly authorized until done by the act of 1852, ch. 191, which restricted the time of their maturity to not less than ten years, nor more than thirty years after date.

We have seen that the act of 18th February, 1854, ch. 180, applied these provisions expressly to Anderson county. It seems, however, that the county court took no further action upon the proceedings of its March term, 1853, until the July term, 1854—in doubt, perhaps, of the validity thereof; but the Legislature having on the 18th February, 1854, by said ch. 180, declared said election and proceeding lawful and binding, the county court in July thereafter took final action in the matter by subscribing the stock, as the sheriff had reported the people as voting for, and ordering the issuance of coupon bonds, payable at thirty years, with semi-annual interest, just as the law required; but providing by the order that the whole shall be paid in six annual instalments. This last provision, however, was not incorporated in the bonds. Now, it is earnestly argued that these bonds are absolutely void, even in the hands of the relator, and all other persons who have bought them in good faith, because, as alleged, the subscription of stock was on condition that the whole debt be paid in six annual instalments, whereas the bonds postpone the payment for thirty years. This would seem to be an anomalous position for a debtor, to object to an indulgence of thirty years, upon a debt at simple interest, when money is so productive and valuable, and at a time when most of that class, both among natural and artificial persons, are importunate for time. But it is nevertheless an argu-

ment pressed with great ability, and which, upon a hasty view of the question, does not lack the virtue of plausibility. The railroad subscription laws require, among other things, that in the levy and collection of taxes for the liquidation of the semi-annual interest, a certain amount shall be also levied and collected, to constitute a sinking fund for the ultimate extinguishment of the bonds.

This sinking fund might be invested in some productive way, and it is certainly demonstrable that the county, in the meantime, increasing in taxable wealth, population, and material prosperity, could not be materially injured even by a much longer postponement of the day of payment. The bonds were, however, afterward issued in the exact form prescribed by law, impressed at their issuance with the sanction of the popular approval, and nurtured into credit and confidence by the recognition and patronage of the county which issued them for a long series of years. If, as the worshipful justices propose in the order of July term, 1854, they are still disposed to extinguish this debt in six annual instalments, we presume the holders of these bonds will not be found impracticable, or refractory in receiving their honest dues. But with a full sense of the great magnitude of the interest involved, we have no hesitation in saying, that so far as the rights of these parties have been unfolded to us by the record, there is no ground assumed in the argument which, in a court of conscience or a court of law, can relieve the county of Anderson from this obligation. If the county had been defrauded in the issuance of these bonds; if it had been done without a vote of the people as to the subscription; or, indeed, if the statutes had not been substantially complied with, then

the case would be presented in a different aspect. But we have here a submission of the question of subscription to the popular vote; the evidence of its endorsement at the polls; the irregularities of that proceeding cured by subsequent legislation; the issuance of these bonds by the constituted authorities of the county; their circulation, from hand to hand, as negotiable commercial paper; their recognition by the court and the people as valid obligations for a period of sixteen years; and after all this we are asked to declare these bonds unlawful in the hands of innocent holders, who have in good faith invested their money in them, because the bonds are made payable in thirty years, as the law directs, rather than in six annual instalments, as it is insisted the people intended. If such was the popular intention, why permit the bonds to issue in the present form? why allow them to be negotiated? why submit quietly, from year to year, for this long period, to annual drafts of the railroad tax, with full knowledge that the original purpose as to payments in six instalments had been perverted and defeated by the issuance of thirty-year bonds?

A county under our law is a corporation. The citizens are the corporators; the county court the agency through which this mortal immortal acts and speaks and hath its being. Like other artificial beings or natural persons, it can ratify the unauthorized acts of its agents. In this case the county of Anderson has done this thing. There can be no question that it was competent for the Legislature to cure, by subsequent enactment, any mere irregularities in the election of 1853. (16 Wall., 644, 8 Ann. R., 87–108). We hold that these bonds and coupons were lawfully issued, and that the mere irregularities referred to will not

be allowed to defeat the rights of the holders. They are payable to bearer, and transferable by delivery, and subject to the same rules as to the rights of the holders as negotiable bills and notes. (Lexington v. Butler, 14 Wall., 295; Mercer County v. Hackett, 1 Wall., 83). In the latter case it was said: "Where a county issues its bonds payable to bearer, and solemnly pledges the faith, credit and property of the county under the authority of law, referred to on the face of the bonds by date for their payment, and those bonds pass bona fide into the hands of holders for value, the county is bound to pay them. It is no defence to the claim of such a holder that the act referred to in the face of the bond authorized the county to issue the bonds only and subject to certain restrictions, limitations and conditions, which have not been formally complied with. (1 Wall., 83.)

In the case of Pendleton Co. v. Army, 13 Wall., 298, it is held that a county issuing bonds to a railroad company in payment of stock in the road, which subscription the county was authorized by legislative act to make, and to pay for by the issue of bonds, only after certain things directed had been performed, said county may be estopped against asserting that the conditions have not been complied with, * * * and an estoppel would take place when the county had received the proper amount of stock for which the bonds were issued, had held it for seventeen years, and was actually enjoying it at the time when pleading a want of authority to subscribe.

13 Wall., 298.

And so in the case of Grand Chanter v. Winegon, 15 Wall., 356, it is held that in a suit against a municipal

corporation, by a *bona fide* holder of its bonds, whose title accrued before maturity, the corporation cannot show by way of defence, if the legal authority to issue the bond is clear, a want of compliance on its part with formalities required by the statute, or show fraud in their own agents in issuing them.

15 Wall., 356.

This is a strong case, and bears much analogy to the case in judgment, if not in the facts, in the principles applicable to both alike. In the case in judgment there can be no pretence that the county of Anderson was not authorized by law to make the subscription, and to issue the bonds in controversy. No fraud is complained of in the county court, but a mere mistake or irregularity as to the time of payment of the bonds. The amount of the subscription was voted by the people, and *this is the vital thing.* The bonds, as issued, follow the law as to the time of payment, whereas, a payment in instalments, as proposed, would have been in derogation of the law, which requires such bonds to be made payable not less than ten nor more than thirty years after date.

Act 1852, ch. 191, I 12. Act 1853, 4, ch. 180.

It will be seen by reference to these acts, that the bonds in controversy were issued in exact and literal compliance with the statutes. They have gone into the hands of *bona fide* holders. The county of Anderson has received the consideration, and has estopped itself from impeaching their validity, except by showing a want of lawful authority to take the stock and issue the bonds. This they have failed to do. We might have contented ourselves by resting this case upon the high authority of the Supreme Court

of the United States, that the bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further for evidence of a compliance with the condition to the grant of the power. (Commissioners, &c., v. Aspinwall, 21 How. 215.) But in view of the great importance of the questions involved, we have met them as represented by the able argument of the counsel for the county of Anderson.

Reverse the judgment, and let a peremptory mandamus be awarded.

SNEED, J.

Exhibit No. 10.

OPINION.

MAYOR AND ALDERMEN OF PULASKI
vs.
GILMORE & CHERRY, O'CONNOR & Co.
} Nashville. 1887.

In 1874 the Directors and Commissioners of the Memphis & Knoxville Railroad Company petitioned the Board of Mayor and Aldermen of the town of Pulaski for a subscription of $40,000 to their capital stock, on such terms and limitations as the board might see proper. The question was submitted to a vote of the people and approved by the requisite majority. The proposition involved the idea of issuing bonds having twenty years to run, each of the denomination of $500, bearing eight per cent. interest; stock to be issued to the corporation equivalent in amount to the bonds thus proposed to be issued. As part of the proposition, it was agreed that these bonds of $500 each were to be issued to pay for the expenses incident to a survey of the line of the road through Giles county. These bonds were issued and came into the hands of the parties plaintiffs in this case before due, and are the basis of the present suit.

We may assume, for the purposes of this opinion, that the proceedings, if not perfectly regular, have nothing in them that can fix any right to urge it against the present holders. They stand as innocent purchasers for value. The only defense that can be made available against the liability

sought to be enforced is a want of authority in the corporation to issue the bonds in question. This is a defense at all times available in such a case, unless it may be the doctrine of estoppel *in pais* may be an exception allowed in certain cases.

The question then is, did the corporation, under the Constitution and laws of the State, have the power to issue these bonds? If so, plaintiff was entitled to his recovery on the coupons, if not, defendant should have had a verdict.

It is the case of a subscription to the stock of a contemplated railroad. The fact that these particular bonds were to be applied to pay for a specific part of the work necessary in the construction of the road, cannot alter the character of the bond nor aid in arriving at a solution of the question of power. Whether to be used for this, or any other purpose connected with the construction of the road, the case would be the same. The proposition submitted to the people, and the contract attempted to be made, was simply a subscription for $40,000 of stock in the corporation, which was expected to build the road, and the bonds of the corporation (these three included) were to be issued in paying for said stock.

By our present Constitution, which in this respect is the same as that of 1834, sec. 2, Art. XXIX, the General Assembly shall have power to authorize counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively in such manner as shall be prescribed by law, and all property shall be taxed according to its value upon the principles established in regard to State taxation. By the Constitution of 1870 there is added, "But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association

or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at such election." We need not examine, discuss or divide the question whether the addenda gives any additional or different power to the Legislature from that conferred in the first clause of the section quoted, that is, to levy taxes for county and corporation purposes, respectively.

It suffices that it was decided many years since that a railroad was a county and corporation purpose, and taxes might be levied under authority from the Legislature, to be used in aid of such enterprises. It is not improper to say that while this is all now settled in our State as an original question, the writer of this opinion did not and does not now concur in its correctness.

The question, however, is whether, under the statutes existent at this time, these bonds were authorized, the power to issue them is given. We need not, as we have said, go into the question of the constitutional power to authorize them. We need scarcely say that in order to the issuance of such bonds there must be an express authority given the city or town, either by a general law of the land, or by a special law for this purpose. No such power can be implied or can be inferred from any of the ordinary powers of such corporations. "No argument," says Judge McKinney, in the case of Cook & Steadman v. Sumner Spinning and Mfg. Co., 1 Sneed 714, "can be necessary to show that the authority to purchase stock in a manufacturing company, or to issue bonds for the payment thereof, cannot be derived simply from the power of taxation conferred in a charter." See also 9 Heisk. 534.

Taxation and payment of all liabilities directly from this means is the normal work of action by such bodies. Bonds on time are not incident to this, and can only be issued when authority is conferred by law.

The old act of 1852, Code, section 1142, and other provisions of that article, is the basis in our general law for such action as may be taken by counties and corporations in subscribing for stock in railroads running to or contiguous to such towns. It is too clear for argument that no such authority is found in these sections.

The act of January, 1871, intended to regulate elections, under the Constitution, in first section, simply embodies the authority contained in the Constitution, as to counties and towns levying taxes for county and corporation purposes, prescribing in the subscriptions the conditions and regulations by which the power shall be executed. But there is nothing in this act that can possibly be construed on any fair principle of construction to authorize the issuance of these bonds in payment of a subscription of stock in a railroad company. What was intended by the reference to "execution of all necessary orders, bonds and payments, in order to carry out" a loan or credit, we need not now determine. See sec. 2, Code, sec. 491*a*. It suffices that there is no authority in this act to issue such bonds as are the basis of this suit; the same having been issued without authority of law, are simply void, whether in the hands of innocent purchasers or others.

Reversed, etc. (Signed) FREEMAN, J.

Exhibit No. 11.

ACTS OF GENERAL ASSEMBLY OF TENNESSEE GIVING STATE AND MUNICIPAL AID TO RAILROADS AND OTHER CORPORATIONS.

Act of 30th December, 1853, authorizing Sumner county to subscribe and issue $30,000 of bonds, due in ten and not more than twenty years.

Act of February 28th, 1852, ch. 191, authorizing counties of Lawrence, Maury, Williamson and Davidson to subscribe whatever stock they please, and issue bonds therefor bearing semi-annual interest at six per cent., and due not less than ten nor more than thirty years.

Act of 25th February, 1867, ch. 48, Acts of 1866–7, authorizing any county through which the Mississippi River Railroad runs to issue negotiable bonds for subscription taken by them.

Act of 18th February, 1854, ch. 180, authorizing Anderson county to issue bonds.

Acts of 1852, granting State aid, expressly authorize the issuance of State negotiable bonds to railroads.

Act of 18th February, 1854, granted to Tipton and *ten* other counties power to take stock in any *railroad*, and issue coupon bonds 10–30 years, six per cent.

Acts of 1866–67, ch. 23, sec. 4, granted to the county courts of counties through which *turnpikes* run power to take stock therein and issue coupon bonds therefor.

Acts of 1866–67, ch. 27, secs. 4, 5, granted to two named counties power to take stock in a *turnpike* and issue bonds therefor.

Acts of 1866–67, ch. 66, sec. 21, authorizes Sevier county to issue its coupon bonds to *turnpike* company.

Acts of 1869–70, ch. 55, grants Haywood county and town of Brownsville power to subscribe stock in a *railroad* company and issue coupon bonds therefor.

Acts of 1869–70, ch. 55, secs. 7, 12, 19, grants same power to towns of Friendship and Newbern and county of Obion.

Acts of 1869–70, ch. 58, sec. 16, grants to certain towns and counties power to take stock in a *railroad* company and issue bonds therefor.

Acts of 1869–70, ch. 63, sec. 15, grants to two counties power to take stock in a *railroad* company and issue bonds.

Acts of 1869–70, ch. 67, sec. 92, grants power to Wilson county to take stock in a *turnpike* company and issue bonds therefor.

By sec. 93 of same act the same power is granted to the town of Lebanon.

Acts of 1869–70, ch. 71, sec. 5, grants to towns and counties power to take stock in a *railroad* company and issue bonds therefor.

Acts of 1869–70, ch. 91, grants to Green county power to take stock in a *turnpike* company and issue coupon twenty-year bonds therefor.

Acts 1851–2, ch. 193, sec. 1, grants to town of Franklin power to take stock in railroads and issue its coupon bonds therefor.

Ch. 117, Acts 1851–2, passed *January 22, 1852*, was the first legislation in Tennessee authorizing subscriptions by counties *generally* in aid of railroad companies and regulating the same. By sec. 12 thereof it was enacted that counties so subscribing might issue their warrants in payment, bearing interest, "payable as desired by said board of directors" (railroad).

Exhibit No. 12.

ACTS OF 1849–50.—CHAPTER LV.

AN ACT to incorporate the towns of Linden, in Perry county, and Dyersburg, in Dyer county, and for other purposes.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the town of Linden, in the county of Perry, and the inhabitants within the limits of said town, are hereby constituted a body politic and corporate by the name and style of the Mayor and Aldermen of the town of Linden, and shall have perpetual succession; by their corporate name shall sue and be sued, plead and be impleaded, purchase and hold property, real, personal and mixed, and dispose of the same for the benefit of said town, and may have and use a town seal.

* * * * * * *

SEC. 7. That the corporation aforesaid shall have full power and authority to enact such laws and ordinances, necessary and proper to preserve the health of the town; to prevent and remove nuisances; to establish night watches and patrols; to ascertain, when necessary, the boundary and location of streets, lanes and alleys; to provide for licensing and regulating auctions; to restrain and prohibit gaming; to provide for licensing, taxing and regulating or restraining theatrical or other public amusements and shows within the town; to keep in repair the streets, and to pass all laws necessary for the same; to regulate tippling houses; to impose and appropriate fines, penalties

and forfeitures for the breach of their by-laws and ordinances; to lay and collect taxes for the purpose of carrying all necessary measures in operation for the benefit and advancement of said town, and to pass all laws necessary and proper to carry the intent and meaning of this act into effect; provided, they are not incompatible with the Constitution and laws of this State.

* * * * * * *

SEC. 12. That the inhabitants of the town of Dyersburg, in the county of Dyer, be and they are hereby made a body politic and corporate, by the name and style of the Mayor and Aldermen of Dyersburg, under the same rules, regulations and restrictions, and with all the powers, privileges and immunities, as are prescribed for the inhabitants of the town of Linden; said corporation shall have perpetual succession. * * *

Passed January 10, 1850.

124-160

127-160

Office Supreme Court U. S.
FILED.
MAR 21 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1887.

EXTEIN NORTON, PLAINTIFF IN ERROR,

vs. } *No. 207.*

MAYOR AND ALDERMEN OF DYERSBURG, TENN.,
DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Western District, at Memphis.

BRIEF AND ARGUMENT OF SP'L HILL & T. B. TURLEY,

FOR DEFENDANTS IN ERROR.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

and forfeitures for the breach of their by-laws and ordinances; to lay and collect taxes for the purpose of carrying all necessary measures in operation for the benefit and advancement of said town, and to pass all laws necessary and proper to carry the intent and meaning of this act into effect; provided, they are not incompatible with the Constitution and laws of this State.

* * * * * * *

SEC. 12. That the inhabitants of the town of Dyersburg, in the county of Dyer, be and they are hereby made a body politic and corporate, by the name and style of the Mayor and Aldermen of Dyersburg, under the same rules, regulations and restrictions, and with all the powers, privileges and immunities, as are prescribed for the inhabitants of the town of Linden; said corporation shall have perpetual succession. * * *

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BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

It is insisted for the defendants in error that the bonds and coupons sued on are void from want of authority in the defendant corporation to issue the same. The legislation in Tennessee bearing on this question, stated in its chronological order, is as follows:

First. Sections 1142 to 1161 inclusive, of the Code of Tennessee of 1858; these sections will be found printed in the Appendix to the Brief for plaintiff in error, in the case of Kelly & Alexander v. Mayor and Aldermen of Milan, Tenn., just heard by this court. The only one of these sections necessary to be here specially noted is section 1148, which is as follows: "If a majority of the legal voters of the county, town or city, as the case may be, estimating the vote by the last preceding governor's election, should be in favor of the subscription, the judge or chairman of the county court, or the mayor of the corporation, shall subscribe the amount of stock so voted for, in the name of the county or corporation."

Second. Chapter 72, section 3, of the Acts of 1867–8, passed March 13th, 1868. By this act, section 1148 of the Code was amended by adding to it the words "and shall issue bonds when called for."

Third. Chapter 11, section 26, Acts of 1868–9, passed December 9th, 1868. Under this act, section 1148 was further amended by omitting the words "and shall issue bonds when called for." In other words, the act of December 9th, 1868, was a practical repeal of the act of March 13th, 1868. The substance of these two acts is found on page 23 of the record.

Fourth. Chapter 59, section 20, Acts of 1868–9, page 311. This act is fully set out as Exhibit No. 7 to the Brief for plaintiff in error; it provides that the town of Dyersburg might subscribe for $50,000 of the capital stock of the Mississippi River Railroad Company, payable in not exceeding four years, by annual assessments, to be collected as other taxes due the town, and that bonds of the town might be issued in anticipation of such collections.

Fifth. Section 18, chapter 55, of the Acts of 1869–70, page 362, passed February 8th, 1870. This act is given as Exhibit No. 8 to the Brief for plaintiff in error; it provides that the stock which had been subscribed, or might thereafter be subscribed in said railroad company, might be payable in six annual payments, and that the corporate authorities might issue short bonds, bearing interest at the rate of 6 per cent. per annum, in anticipation of the collection of the annual taxes, if thereby the construction of the railroad could be facilitated.

Sixth. Section 29, Article II, Constitution of 1870, which went into effect on the 5th of May, 1870. This section will be found as Exhibit No. 1 to the Brief for plaintiff in error. As will be seen, it provides that the credit of no county, city or town shall be given or loaned to any person, company, association or corporation, except upon an election and the assent of three-fourths of the votes cast

thereat. And it further provides that no county, city or town shall become a stockholder with others in any company, association or corporation, except upon a like election and assent of a like majority.

Seventh. Chapter 50 of the Acts of 1870–71, passed January 16, 1871. This act is Exhibit No. 2 to the Brief for plaintiff in error. As shown in its caption, it was passed to enforce section 29, Article II, of the Constitution, and its phraseology is almost identical with that section.

Eighth. Chapter 122 of the Acts of 1871, page 133, and Chapter 129 of the same Acts, page 142. See Exhibits 3 and 4 to the Brief for plaintiff in error. Both of these acts amended the Code, with reference to the ratio between subscriptions to the railroad and the taxable property of the county or corporation subscribing; and the first of these acts is intended to validate previous subscriptions where the same were in excess of the amount allowed by section 1142 of the Code, and under it a new election is allowed if deemed advisable.

I.

It will hardly be controverted that counties and municipal corporations must have legislative authority for the issuance of bonds.

Ottoway v. Perkins, 94 U. S. 260.
Pendleton v. Amy, 13 Wallace 297.
Kenniscott v. Supervisors, 16 Wallace 452.
St. Joseph v. Rodgers, 16 Wallace 644.
Coloma v. Eaves, 92 U. S. 484.
Marsh v. Fulton County, 10 Wallace 676.
Police Jury v. Britain, 15 Wallace 566.
Mayor Nashville v. Ray, 19 Wallace 468.
Milan v. Railroad Company, 11 Lea 329.
Pulaski v. Gilmore, Exhibit No. 10 to the Brief for plaintiff in error.

II.

Is there any express authority for the issuance of these bonds? Such authority is claimed under the following of the acts referred to above:

First. Chapter 50 of the Acts of 1870–71, passed January 16, 1871, is relied on as giving express authority for issuing these bonds. This act was directly before the Supreme Court of Tennessee in the Mayor and Aldermen of Pulaski v. Gilmore and Cherry, *supra*, decided at Nashville in 1887. The opinion in the case, as already stated, will be found as Exhibit No. 10 to the Brief for plaintiff in error. In this case, in 1874, the town of Pulaski subscribed for $40,000 of the capital stock in the Memphis & Knoxville Railroad, and issued its twenty years' bonds in payment for the same. This act of 1871 was relied upon as giving authority to issue said bonds. The court says:

"We need scarcely say that in order to the issuance of such bonds there must be an express authority given the city or town, either by a general law of the land, or by a special law for this purpose." * * * "The act of January, 1871, intended to regulate elections under the Constitution, in first section, simply embodies the authority contained in the Constitution, as to counties and towns levying taxes for county and corporation purposes, prescribing in the subscriptions the conditions and regulations by which the power shall be executed. But there is nothing in this act that can be possibly construed, on any fair principle of construction, to authorize the issuance of these bonds in payment of a subscription of stock in a railroad company."

This act, as shown by its caption, was intended to enforce Article II, section 29, of the Constitution of 1870. Neither the Constitution nor this act confer any authority to lend credit or subscribe stock, but simply regulate the exercise of the authority if it exists elsewhere. As stated by the circuit judge, "the only effect of

this act, or the constitutional provision referred to in it, on the general law, and it so affects all special laws as well, is to abrogate all provisions allowing the subscription for stock to be made on less than a three-fourths vote of the qualified electors voting at the election in favor of it. In all other respects, the statutes authorizing subscriptions remain as they were before this act was passed."

See record page 28.

The Supreme Court of Tennessee, in the Pulaski case just cited, so construed the act. As already quoted, it says:

"The act of January, 1871, intended to regulate elections under the Constitution, in first section, simply embodies the authority contained in the Constitution, as to counties and towns levying taxes for county and corporation purposes, prescribing in the subscriptions the conditions and regulations by which the power shall be executed. But there is nothing in this act that can possibly be construed to authorize the issuance of bonds in payment of a subscription of stock in a railroad company."

Again, the Constitution in this act provides for two methods of aiding and encouraging the railroad enterprise:

1st. By giving and lending the credit of the county, city or town to, or in aid of, the railroad.

2nd. By becoming a stockholder in the enterprise.

These two methods are both well known and frequently resorted to, but they are essentially distinct. Under the first method, as generally adopted, the county, city or town, as between itself and the railroad, becomes the surety of the latter. It either indorses the railroad securities or issues its own bonds, with an understanding that they are to be protected by the railroad, or mortgages its property for the payment of the railroad bonds, as was done in the case of Adams v. Memphis & Little Rock Railroad, 2 Cold. 645. Or it may possibly donate its credit to the railroad. It is manifest

that this plan cannot be fully carried out without the execution of bonds, endorsements, or other necessary contracts; hence, in the act of January, 1871, in providing for this method, the county court or board of mayor and aldermen, is empowered to execute all necessary orders, bonds and payments. Under the second plan the county, city or town simply becomes a stockholder on the same basis as all other stockholders, and can do so without the issuance of bonds. And thus we find that when said act of 1871 provides for a city, town or county becoming a stockholder, it makes no provision for bonds. If the lending of credit embraced the subscription for stock, then there would have been no need for the last clause of the second sub-section of section 1 of the said act of January 16, 1871.

In the case of Milan v. The Railroad, *supra*, the construction which we insist should be placed upon the act of January 16, 1871, was applied to an act containing provisions much more favorable to the power to issue bonds. The act construed in that case was Chapter 53, of the Acts of 1869–70, sections 4, 5 and 15, said act being entitled, "An act to secure the completion of the Tennessee and Pacific Railroad." Section 4 authorized the county of Dyer and other counties to subscribe for stock in said railroad company. Section 5 provided that such subscriptions should be paid in thirty-year bonds. Section 15 provided that the town of Milan, and other towns in said counties mentioned in section 4, should have the same power and authority to make subscriptions to the stock of said railroad and to lay and collect taxes to pay the interest on the bonds as is granted to said counties. It will thus be seen that section 15 contained express reference to bonds that might be issued for such town subscriptions, while that portion of the act of January 16, 1871, which authorizes counties, cities and towns to become stockholders in railroad corporations, contains no reference of any kind to bonds. It was insisted that the said section 15 authorized the towns of Milan and Trenton to issue bonds in payment for their subscriptions to said Tennessee and Pacific Railroad.

Upon this question the court decided as follows: "The next question is, does the 15th section give a power to issue bonds at all? It certainly gives the same power to make subscriptions as are given in section 4, but it does not provide for the issuance of bonds, as in section 5. It makes no provision whatever for the issuance of bonds. All that is said upon the subject of bonds is, 'To lay and collect taxes, within their several corporations, to pay interest on the bonds that may be issued.' Whether the Legislature or the draftsman of the act had the opinion that there already existed a law authorizing the issuance of bonds, or whether it was intended to enact such a law at a subsequent day of the session, we can not determine. Certain it is that no such then existed; that none such was subsequently made, and none such can be created by any reasonable intendment from the act before us. The construction contended for by the defendants would be to alter the law and terms of the contract, or rather to make a new contract in conformity to law for the parties. As under the law of this State contracts of the character before us can only be made under a legislative authority, and as all persons are presumed to know the law, the holders of the bonds must be holden to have had notice of the want of authority to issue."

For the general distinction between a loan of credit and subscription for stock, see the following cases:

People v. Salem, 20 Michigan.
Stewart v. Polk County, 27 Iowa.
Allen v. Town of Ivy, 60 Maine.
Walker v. Cincinnati, 21 Ohio.
Miller v. Leavenworth, 7 Kansas.
L. & N. R. R. Co. v. Davidson County, 2 Sneed.

Second. Express authority for the issuance of these bonds is also claimed under sec. 20, Chap. 59, Acts of 1868–9, page 311, and sec. 18, Chap. 55, Acts of 1869–70, page 362. See Exhibits 7 and 8 to the Brief for plaintiff in error.

As to the first of these acts, as already shown, it authorizes a subscription of $50,000 of stock, to be paid for in not exceeding four years, by annual assessments of taxes, and provides that bonds may be issued in anticipation of the collection of the taxes. The $50,000 is to be paid in four years by annual assessments. The act, in the most express terms, prohibits any extension beyond the four years. But inasmuch as the necessities of the railroad might require the money before the taxes fell due, the town was allowed to issue bonds in anticipation of the taxes. These bonds, if issued, were to be paid by the four annual assessments. No other fund was provided, or was to be provided, for their payment. It is thus apparent that the act only authorized the issue of $50,000 of bonds, one-fourth to be paid in one year, one-fourth in two years, one-fourth in three years and one-fourth in four years. Beyond this it gave no power to issue bonds.

As to section 18, Chapter 55, Acts of 1869–70: This section occurs in a chapter authorizing the counties of Dyer, Haywood, and other counties, to subscribe to the stock of the Mississippi River Railroad and other roads, and issue bonds in payment of same. No additional power is given anywhere in the act to the town of Dyersburg, either to subscribe for stock or to issue bonds. The only effect that it can possibly have is to modify section 20, Chapter 59, Acts of 1868–9, so as to make it provide that the subscription should be paid in not exceeding six years, by annual assessments, and that bonds of the town might be issued to the railroad company in anticipation of the collection of the annual levies bearing interest at the rate of six per cent. per annum. If possible, it more explicitly expresses the idea that the bonds were to fall due annually, at the same time the annual levies matured. Certainly these acts do not sustain ten year bonds bearing seven per cent. interest. Under legislative authority the town of Okolona was authorized to issue railroad bonds, payable at a time "not to extend beyond ten years from the date of issuance." The bonds as issued were made paya-

ble twenty years from the date of issuance. It was held that the bonds were unauthorized, illegal and void for want of authority to issue same.

Woodruff v. Okolona, 57 Miss. 806, 808.

The Supreme Court of Tennessee, in Milan v. Railroad, *supra*, is equally emphatic on this subject. Under sections 4 and 5 of the act relied on in that case, the bonds were to be of the denomination of $1000 each, not having more than thirty years to run, and were to bear interest at the rate of six per cent. per annum. The bonds issued were of the denominations of $50, $100 and $500, running thirty years, and bearing interest at eight per cent. per annum. These bonds were declared void, because unauthorized by and in violation of the terms of said act. The court says:

"It is the rule in this State that powers like the one before us, which can only be derived in the way pointed out by the Constitution and laws of the State, must be strictly construed and pursued."

11 Lea 334.

It is urged for the plaintiff that inasmuch, as by Chapter 69 of the Acts of 1869–70, Exhibit 5 to the Brief for plaintiff in error, it was lawful at the time these bonds were issued to contract for any rate of interest not exceeding ten per cent., the bonds might be lawfully issued bearing eight per cent.; but this conventional interest law has nothing to do with the question. It was in force when the bonds were issued in the Milan case just referred to, yet no one thought it sustained those bonds. The town of Dyersburg was a municipal corporation, acting under a special grant of power which it could not exceed. While the conventional interest law was in force, suppose A, by written authority, had authorized B, as his agent, to subscribe for stock in the Mississippi River Railroad Company in his, A's, name, and to pay for same by executing a note in A's name, payable in not exceeding six years, and bearing six per cent. interest; and that B, after exhibiting this written authority to the railroad company, had executed the note at ten years,

bearing eight per cent. interest, would it be contended that such a note could be enforced? And yet the town of Dyersburg had no greater power under these statutes than had the agent in the supposed case.

The cases of Louisville & Nashville Railroad Company v. the County Court, 1 Sneed, and Ross v. Anderson County, Exhibit 9 to the Brief for plaintiff in error, are relied on as sustaining the right to issue these bonds, payable at ten years instead of annually, for from one to four years or one to six years. These cases, when examined, do not sustain the position for which they are cited. In the 1st Sneed case the act provided that not more than one-third of the stock subscribed should be collected in any one year. It nowhere prohibited more installments, and in less amounts. In the case at bar the act prohibits any extension of time beyond four or six years. In Ross v. Anderson County the subscription was originally voted under the act of 1852, Chapter 117 (now Code, section 1142, *et seq.*), which did not authorize bonds to be issued. It provided that no more than thirty-three and a third per cent. of the subscription should be collected in one year. Here again the minimum time and amount was fixed, not the maximum. Afterwards, by the act of 1854, the county was authorized to pay for the stock in bonds falling due in not less than ten nor more than thirty years. As stated by the circuit judge below: "There a subsequent statute varied the terms which the vote had fixed; here the vote varies the terms which the statute has fixed." It is thus seen that the question now under consideration was not involved in either of those cases, while it was directly in issue in the Milan case referred to above.

The following cases illustrate how strictly these powers are construed:

In Bell v. Railroad Company, 4 Wal. 598, it was held that the county court could not change the terms of subscription, as voted by the people, without legislative authority.

The acts of 1868–'69, page 311, and section 18, chapter 55, acts of 1869–'70, page 362, Exhibits 7 and 8 to brief for plaintiff in error, not only do not authorize ten-year eight per cent. bonds, but have no application whatever to this case. These acts only conferred authority on the town of Dyersburg to subscribe stock, payable in not more than six annual installments to the *Mississippi River Railroad.*

They confer no authority whatever to subscribe stock to any other railroad than the *Mississippi River Railroad.*

The subscription in this case was made and bonds issued, as appears upon the face of the bonds themselves, not to the *Mississippi River Railroad,* but to the *Paducah and Memphis Railroad, a different and distinct corporation from the Mississippi River Railroad,* and operating under a different and distinct charter. The fact that the *Paducah and Memphis Railroad* became the purchaser and owner of the Mississippi River Railroad, by consolidation or otherwise, would not authorize the town of Dyersburg, under these acts, conferring only power to subscribe for stock, &c., in the Mississippi River Railroad, to subscribe for stock in a new and different corporation, the Memphis and Paducah Railroad. In the language of Mr. Justice Bradley, in Harsman *vs.* Bates County, 92 U. S., 575, "the extinction (by consolidation) of the company in whose favor the *subscription was authorized* worked a revocation of the power. The law authorizing the consolidation of railroad companies does not *change the law of attorney and constituent.* It may transfer vested rights of one railroad company to another upon a consolidation being effected, but it does not continue in existence power to subscribe for stock given by one person to another which by general law are *extinguished* by such change."

See also Marsh *vs.* Fulton County, 10 Wallace.

Therefore the acts above referred to have no application to this case.

In Storm v. Genoa, 23 N. Y. 454, authority to borrow money on seven per cent. bonds, and pay it out for stock, was held not to authorize the issuance of bonds directly to the railroad in payment of the stock.

Jonesboro v. St. Louis & Cairo Railroad Co., 110 U. S. 192, holds that the power to borrow money and issue bonds does not give authority to subscribe for stock and issue bonds in payment thereof.

The statutes discussed above are the only ones relied on for express authority to issue the bonds.

III.

It is next insisted for plaintiff in error that the power to subscribe for stock carries by implication the power to execute bonds negotiable in form independent of any express authority. While various expressions from different cases and text-books are cited for this position, it will be seen that no case going fully to the extent claimed is produced. See Daniels on Negotiable Instruments, section 1533. Let us examine the cases cited in the Brief for plaintiff in error, under this head.

The two cases from 1st Wallace, and the case from 41 Penn. State, referred to on pages 18 and 19 of the Brief, explain themselves.

In the one case, the authority to subscribe was given as fully as an individual could exercise it. In the other case the corporation had authority to borrow money for any object in its discretion. The citation from Morawetz on Corporations, vol. 2, sec. 350, applies exclusively to private corporations. The question was not raised in the case of the Police Jury v. Britain, 15 Wal. Indeed, in that case the court held that the power to contract for work, issue warrants in payment thereof, and provide taxes for the payment of same, did not include the power to issue bonds.

In the case of Hulls & Orgalls v. County of Marshall, 12 Iowa 142, the county judge had issued county bonds to pay for building a courthouse without a vote being first had. Under the Iowa statute the ordinary expenses were to be paid by the judge's warrant on the treasury. For extraordinary expenses, by vote of the people, money might be borrowed. The statute creating the office of county judge made it his duty to provide for the erection of courthouse, jail, &c. From this it was argued that he had implied power to pay for same by issuance of county bonds. The court held to the contrary, and declared the bonds void. It lays down the doctrine that the fiscal operations of a county are prescribed by law, and when so prescribed, the power must be exercised precisely as it is given. The court says that when the people vote to borrow money for extraordinary expenses, it may carry the power to issue bonds; but that question was not involved.

Gause v. City of Clarksville, 5 Dillon 165, was a case involving two sets of bonds, issued by the defendant: The first were issued to build wharves and open streets. There was no express power in the charter to issue these bonds. The court held that a municipal corporation had no inherent power to borrow money and issue negotiable securities, that such power must be conferred by the statute; and adopting the English rule on this subject, held the first class to be void. The second class were issued under a statute of Missouri, allowing cities to subscribe for stock in companies organized to build gravel roads. These bonds were sustained, first, because of the universal practice under the statute in Missouri, and, second, because of the very limited amount of taxes authorized by the statute. If the question had been freed from these circumstances, it is clear that the court would have held these bonds void also.

Wills v. Gleason, 11 Wis. 470. In this case the city of Madison was authorized to buy a cemetery and establish markets, etc. The court held that in order to carry out and accomplish these purposes

the city had the right and power to borrow money, and from this power to borrow money the power to issue bonds was implied.

In the Bank v. Chillicothe, 7 Ohio 354, the question was not upon the issuance of bonds, but whether the city had the right to borrow money. The court said it was a case of first impression, but sustained the power under provisions in the charter giving the city the right to purchase, receive and possess real and personal property for the use of the town and to erect public buildings.

Commonwealth v. Pittsburg, 34 Penn. 496, is a case where the Legislature authorized the city of Pittsburg to subscribe to the capital stock of the Chartiers Valley Railroad Company, to borrow money to pay for the subscription, and to make provisions for the payment of the principal and interest of the money so borrowed. Under these powers it was held that bonds could be issued.

Griffin v. Inman, 57 Ga. 370, is a case almost identical in its facts with the Penn. case just noticed.

Black v. Cohen, 52 Ga. 623, was a case in which two classes of bonds were involved. The first were bonds issued to take up valid city indebtedness. After these bonds were executed and delivered the Legislature passed an act ratifying and approving the issuance thereof. The second class of bonds involved in this case were railroad bonds issued under an act giving express authority to the city of Rome to subscribe for stock and pay for the same in bonds.

Ketchum v. Buffalo, 14 N. Y. 356. In this case the city of Buffalo had power to establish and regulate markets. Held that this power authorized it to purchase market grounds on credit. The facts were that the city purchased the market site for $35,000, and gave its bond to the vendor for that amount. The court said that the city might buy on credit, and issue its note or bond to the vendor for the thing bought; but that this did not go to the extent that it had implied power to issue its bonds generally and raise money to buy the market site and other property. The power to

use its credit should be limited to contracting directly for the accomplishment of the object authorized by law.

It will thus be seen that in no one of these cases is it held that the power to subscribe for stock necessarily carries with it the power to issue bonds in payment thereof. It is insisted, however, that this theory of implied power is fully indoctrinated into the laws and decisions of the State of Tennessee, and several cases are relied on for this position, which will now be noticed.

Union Bank v. Jacobs, 6 Hum., is the first. That case simply holds that railroad corporations can make debts for corporate purposes and give notes for the same.

Nichols v. Mayor, 9 Hum., is the next cited. In this case the Legislature gave Nashville express power to subscribe for stock in the Chattanooga railroad and issue its bonds in payment for the same. The question was whether, under section 29, article 2 of the Constitution of 1834, which provided that the Legislature might authorize counties and towns to impose taxes for county and corporation purposes, a subscription to railroad stock was a county or corporation purpose. This was the only question involved. The court held that it was, and sustained the bonds.

In Adams v. the Memphis & Little Rock Railroad, 2 Cold., next cited, the city of Memphis mortgaged a portion of its property to secure the bonds of the Memphis and Little Rock Railroad. This case was construed by this court in Nashville v. Ray, 19 Wallace, where it is held that it does not establish this doctrine of implied power. The language of the court in the 19 Wallace case, in commenting on Adams v. The Railroad, is as follows:

"Other doctrines were propounded in the opinion of the court with reference to implied powers of municipal corporations which were not necessary to the decision of the case, and need not be here adverted to."

Ross v. Anderson Co. is also relied on. In this case, as the circuit judge clearly points out, there was express authority for the issuance of the bonds. The question of implied power did not arise.

The case of Williams v. R. R. Co., 9 Bax. 488, cited in the supplement to Brief for plaintiff in error, is the last case referred to. In that case, however, the question under consideration was not raised or discussed. There the county of Marshall had subscribed to the stock of the Duck River Valley Railroad, and issued bonds in payment for same. The attack on the part of the tax-payers was made upon the subscription alone, and was based upon two grounds: 1st, irregularities in the subscription, and 2d, the invalidity of the charter of the railroad company. For these reasons it was insisted that the original subscription, and all acts done thereunder, were absolutely void. No point was made upon the power of a county or municipal corporation to issue bonds in payment of a valid subscription, and that question was not noticed or passed on by the court. The case is not in conflict with the later cases of the Railroad v. Milan and Gilmore v. Pulaski, *supra*. In any event the bonds in the case at bar were not issued or negotiated on the faith of this decision. They were issued in 1873, while this case was not decided until 1876; and if it should be considered as going to the full extent claimed by the plaintiff in error, it is overruled by the later cases just referred to, one of which was decided in 1883 and the other in 1887. A state of facts is thus presented where this court will follow the latest construction given by the highest court of Tennessee, of the laws and Constitution of that State.

Taylor v. Ypslanti, 105 U. S. 71.

But we again insist that in no one of the Tennessee cases cited for plaintiff in error was the question of such implied power, as is now claimed, necessarily involved; while in the two cases of Milan v. Railroad and Pulaski v. Gilmore, already adverted to, it was directly raised and decided in the negative. In these cases the Supreme Court of Tennessee lays down the doctrine that express

power is needed. Indeed, Exhibit No. 11 to the Brief for plaintiff in error shows that no such principle has been indoctrinated under the laws of Tennessee. In that Exhibit, nineteen instances are shown where the Legislature of Tennessee, after authorizing a subscription for stock, deemed it necessary to add express power to issue bonds. If the power to subscribe carries the power to issue bonds, why the necessity of these acts? The power to issue negotiable bonds is fraught with great danger to the citizen, and as already shown is not a necessary ingredient in the power to subscribe for stock. Such subscriptions can and ought to be paid out of tax-levies. But even if the power to subscribe as a general rule did carry with it the power to issue bonds, the acts under which Dyersburg was authorized to make this subscription would be an exception to the rule, for in these acts the manner in which the subscription is to be paid is so clearly and definitely set out as to exclude all room for implication.

But little reflection is required to convince us that the power to issue bonds is not a necessary ingredient in the power to subscribe for stock. The latter power may be fully exercised without the former. A fundamental principle governing all corporations is, that the capital stock is a trust fund, to be paid in money, or property suitable for corporate uses, and not in notes or securities which the corporation may have to sell at a discount, or which it may have to endorse, and thus be liable on its endorsement. But it is said that in case of municipal and county subscriptions, to pay the money down, through a tax levied at once, would result in great burden to the taxpayers, and hence bonds are required. Even if this were true, it is a difficulty to be provided for by the Legislature. But as a general rule, no such difficulty exists. Corporations to construct railroads, and other like public enterprises which require time for their completion, are the only classes of corporations to which towns and counties are ever allowed to subscribe stock. Stock in such corporations generally is, and always ought to be,

made payable at stated times, on calls, to pay for the work as it progresses. There is no need for its accumulation in the treasury of the company, there to lie idle, a temptation to corporate extravagance and corruption. Such calls can be met by periodical levies. Even when individuals subscribe to such corporations and give stock notes, these notes are not intended for negotiation, and as a general rule are not negotiable. They are intended merely to secure the payment of calls as made. These views on the nature and requirements of stock subscriptions show that they can be easily and readily met without the issuance of negotiable securities. As was well said by the Justices below in deciding the case of Kelly & Alexander v. Milan, just heard by this court: "It is only necessary implications that are ever indulged in any case; necessary in the sense of being the consequential effect of the use of the language employed, and without which implication the manifest purpose of the statute would fail. This kind of necessity is too often confounded with the necessitous circumstances of the private interests of the parties involved, which can in no sense influence a court in the interpretation of the legislative rules."

But when we come to actual legislation on this subject, in almost, if not in every instance, the precise way in which county and municipal subscriptions are to be paid or provided for has been specifically pointed out. So universal has been this legislative habit that no case has been presented to the court, passing on the pure question of the effect of a simple power to subscribe, unaccompanied with other provisions pointing out the manner in which the subscription is to be met. When the manner of providing for or paying the subscription is pointed out in the statute, then there is no room for implication. We have already shown that in the acts applying specially to the town of Dyersburg the manner of payment is most specifically prescribed. The same will be found equally true of the general laws of Tennessee in force upon this subject. Code, section 1142, *et seq.* After providing for the manner in

which the election shall be held and the subscription made, section 1149 provides that the money raised under the provisions of the act shall be expended within the county in which such stock is taken, or as near thereto as practicable. Section 1150 provides that the county court or corporate authorities shall levy a tax on the taxable property in the county or corporation sufficient to *meet the installments of the subscriptions as made.* Sections 1151, 1152 and 1155 provide for the collection of the tax and its payment to the railroad company—not to the holders of the bonds, but to the railroad company. Section 1154 provides that not more than one-third of the stock can be collected in one year.

Sec. 1156 provides that the tax-collector shall, as he receives the tax, give to each taxpayer a certificate in such form as the railroad company may prescribe, showing the amount of such tax paid by him, of which he shall retain a duplicate, to be delivered to the president of the railroad, and that such certificate shall be negotiable by delivery or assignment, and receivable in payment for freight or passage on the railroad in which the subscription is taken, after the expiration of one year from the completion of such road.

Sec. 1157 provides that the holder of such certificate to the amount of one share or more of the stock of such railroad company is entitled to demand and receive from the company, in lieu thereof, a certificate of stock in said company, which shall give him all the privileges of any other stockholder. Secs. 1160 and 1161 provide that for the purpose of meeting unexpected contingencies, the county or corporation may anticipate the collection of the railroad tax by the issuance of warrants, bearing six per cent. interest, and payable at such time as may be desired by the railroad companies; and that in such case a sufficiency of the railroad tax shall be paid into the county treasury to meet the warrants as they fall due, instead of being paid over to the railroad direct.

County warrants are drawn by the chairman of the county court on the county treasury. Code Tenn., sections 4216 and 4217. They are not negotiable.

Nashville v. Ray, 19 Wal. 468.

Claiborne Co. v. Brooks, 111 U. S. 400.

These warrants are to be paid out of the tax levied, just as the installments of subscription which they anticipate are to be paid.

Under acts of the Legislature of Mississippi, almost identical in their provisions with the sections just quoted from our Code, the county of Pontotoc issued to the Selma, Memphis & Marion R. R. its twenty-year coupon bonds in payment of stock subscribed to that road. The question of the validity of these bonds came before this court in Wells v. The Supervisors, 102 U. S. 625. It was earnestly pressed upon the court that the power to subscribe for the stock carried by implication the power to issue the bonds. The court held that the special provisions made for the payment of the subscription excluded any such presumption and implication, and pronounced the bonds void. The question of implied power came before this court again in Claiborne Co. v. Brooks, 111 U. S. 400. In that case the county of Claiborne, Tennessee, issued its bond or obligation for $5000 to one Sterne, in payment for work done in the erection of a courthouse.

Sterne endorsed the bond to Howard, Cole & Co., whose assignee in bankruptcy sued the county thereon. The county set up payments to Sterne as a defense. Under the Code of Tennessee the county had power to erect county buildings. The circuit court held that the power to contract for the erection of a courthouse involved and implied the power to issue notes, bonds and other commercial paper in payment for same, and refused to allow the payment set up by the county. This court reversed the ruling of the circuit court, and held that the power to issue bonds ought not to be implied from the power to make contracts and incur indebtedness. The great danger of the power to issue negotiable bonds was pointed out

and dwelt upon. The cases of Mills v. Gleason, 11 Wis., and Bank of Chillicothe v. Chillicothe, 7 Ohio, relied on by plaintiff in error in the case at bar, were pressed upon the court, but it declined to follow them. Ross v. Anderson Co. and Lynde v. Winnebago, 16 Wal., *supra*, were also pressed upon the court. As to the first of these cases, the court said that the power to issue bonds was expressly given, and that the opinion expressed by the Supreme Court of Tennessee, that "a county, like any other corporation having the right to create a debt, has also the incidental right to issue the commercial evidence of it, in such forms as may be satisfactory to the parties," should be regarded as only a "dictum." As to the case of Lynde v. Winnebago, it pointed out that the county in that case had express legislative authority to borrow money for the erection of public buildings.

IV.

Finally, it is insisted that this court should hold the defendant in error as upon non-negotiable bonds or notes, treating the issuance of negotiable bonds as an excess of authority only, and not invalidating the loan with interest as agreed upon.

Nashville v. Ray, 19 Wallace, is cited for this position. That case simply holds that certificates of indebtedness for services rendered, or for property furnished for the use of a city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due the public creditors, are necessary instruments for carrying on the machinery of municipal administration, but it holds further that they are not negotiable, and the doctrine of innocent purchaser has no application to such certificates or drafts.

In Buchanan v. Litchfield, 102 U. S., which was a suit upon bonds, this question was disposed of as follows:

"Whether the city is under a legal obligation to make restitution of the money, obtained without authority of law; that is, to refund

to the proper party or parties, such sums as were actually received by its authorized agents or officers upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds."

Ottoway v. Perkins, 94 U. S. 260.

In the case at bar, the suit is on the bonds. The only question is, are they valid and binding on the defendants?

If plaintiff in error has any equities or rights against defendants in error, growing out of the original transaction, they cannot be enquired into in this action.

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